(1)

No. 87-1383-ADX
Status: GRANTED

Title: United States, Appellant
v.
Irwin Halper

Docketed:
February 17, 1988

Court: United States District Court for the Southern District of New York

Counsel for appellant: Solicitor General

Counsel for appellee: Halper,Irwin, Roberts Jr.,John G.

NOTE: Notice of appeal filed 11/19/87 cited 10/21/87 ord. ext. time to file to & incl. 11/25/87 by Marshall, J., not cited 1/13/88 ext. granted to & incl. 2/17/88 by Marshall, J., cited

Entry	Date	Note	Proceedings and Orders
1	Oct 15 1987		Application for extension of time to docket appeal and order granting same until November 25, 1987 (Marshall, October 21, 1987).
2	Jan 12 1988		Application for further extension of time to docket appeal and order granting same until February 17, 1988 (Marshall, January 13, 1988).
3	Feb 17 1988	G	Statement as to jurisdiction filed.
4	Mar 23 1988		DISTRIBUTED. April 15, 1988
5	Apr 22 1988	F	Response requested -- HAB, BRW, TM.
6	May 19 1988		Motion of appellee to dismiss filed.
7	May 24 1988		REDISTRIBUTED. June 9, 1988
8	Jun 13 1988		PROBABLE JURISDICTION NOTED.
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10	Jul 11 1988		Order extending time to file brief of appellant on the merits until August 27, 1988.
11	Aug 24 1988		Joint appendix filed.
12	Aug 26 1988		Brief of appellant United States filed.
13	Oct 17 1988		John G. Roberts, Jr., Esquire, of Alexandria, Virginia, a member of the Bar of this Court is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
14	Oct 20 1988		Record filed.
		*	Original proceedings of U.S. District Court for the Southern District of New York.
15	Nov 18 1988	G	Application (A88-408) to file a brief as amicus curiae, at invitation of the Court, in support of the judgment below, in excess of page limits, submitted to Justice Marshall.
16	Nov 23 1988		Application (A88-408) granted by Justice Marshall, allowing a maximum of 50 pages.
17	Dec 1 1988		Brief amicus curiae in Support of the Judgement Below filed.
19	Dec 20 1988		CIRCULATED.
20	Dec 30 1988	X	Reply brief of appellant United States filed.
21	Jan 17 1989		ARGUED.

87-1383

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the $2000-per-false-claim penalty prescribed by the civil False Claims Act, 31 U.S.C. 3729-3731, when applied to a defendant who has already been convicted and punished under the criminal false claims statute (18 U.S.C. 287) for 65 false claims of $9 each, is in effect a criminal penalty prohibited by the Double Jeopardy Clause.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Morris Halper, M.D., was named as a defendant in the government's complaint in the district court, but the complaint was dismissed as against him pursuant to a stipulation.

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In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court declaring the statute unconstitutional as applied (App., *infra*, 1a-5a) is reported at 664 F. Supp. 852. A prior, superseded opinion of the district court (App., *infra*, 6a-11a) is reported at 660 F. Supp. 531.

JURISDICTION

The judgment of the district court (App., *infra*, 12a) was filed on October 21, 1987.[1] A notice of appeal to this

[1] An earlier judgment was filed on May 1, 1987. That judgment was superseded when the district court issued a new opinion, altering the relief awarded, in July 1987. The October 21 judgment was entered pursuant to the July 1987 opinion. On October 28, 1987, the district court on its own motion entered yet a third judgment (App., *infra*, 15a), which did not come to our attention until December 1987. The October 28 judgment, like the October 21 judgment, awards the United States double damages of $1170 in accordance with the court's July 1987 opinion, but does not award the additional $130,000 to which the United States is entitled under the $2000-per-false-claim penalty prescribed by the False Claims Act. The October 28 judgment

Court (App., *infra*, 13a-14a) was filed on November 19, 1987. On January 13, 1988, Justice Marshall extended the time within which to docket this appeal to and including February 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

31 U.S.C. 3729, before its amendment in 1986, provided in pertinent part:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the

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differs from the October 21 judgment only in that it explicitly awards costs to the government. The October 21 judgment, which was cited in our notice of appeal (*id.* at 13a), constitutes the court's final judgment in this case for purposes of appealing from the court's holding in its July 1987 opinion that the statute is unconstitutional as applied. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 373-374 n.10 (1984); *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952).

[2] "[A] direct appeal [under 28 U.S.C. 1252] may be taken when, as here, a federal statute has been held unconstitutional as applied to a particular circumstance." *United States* v. *Darusmont*, 449 U.S. 292, 293 (1981) (per curiam); see *California* v. *Grace Brethren Church*, 457 U.S. 393, 405 (1982) (citing *Fleming* v. *Rhodes*, 331 U.S. 100, 102-103 (1947)).

> Government or a member of an armed force a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *.

31 U.S.C. 3729, as amended by Section 2 of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3153-3154, provides in pertinent part:

> (a) * * * Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * *.
>
> * * * * *
>
> * * * A person violating this subsection shall also be liable to the United States Goverment for the costs of a civil action brought to recover any such penalty or damages.

STATEMENT

1. The civil False Claims Act, 31 U.S.C. 3729-3731, was first enacted in 1863 and signed into law by President Lincoln in an effort to "stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War." *United States* v. *Bornstein*, 423 U.S. 303, 305 n.1, 309 (1976). It is "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, 99th Cong., 2d Sess. 2 (1986); see H.R. Rep. 99-660, 99th Cong., 2d Sess. 18 (1986)). "[T]his statute has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4).

In pertinent part, the statute gives the United States (31 U.S.C. 3730(a)) a civil cause of action against defined classes of persons who seek the payment of false claims by the federal government (see 31 U.S.C. 3729). The version of the statute that was in effect at the time of the false claims in this case provides that, if a defendant is determined to have committed a false claim violation within the meaning of the Act, the government is entitled to recover a civil penalty of $2000 plus double damages and costs. 31 U.S.C. 3729. The $2000-per-claim penalty remained in the statute, unchanged, from 1863 to 1986 (H.R. Rep. 99-660, *supra*, at 17).[3]

[3] On October 27, 1986, the President signed into law the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986 Amendments). The 1986 Amendments revise the civil False Claims Act to provide in most instances for a civil penalty of from $5000 to $10,000 plus triple damages and costs. See 1986 Amendments § 2, 100 Stat. 3153-3154. It is the position of the United States that (with limited exceptions) the 1986 Amendments are applicable to all cases pending on their effective date, including cases in which the false claims were made earlier. See *United States* v. *Hill*, No. MCA 84-2144-RV (N.D. Fla. Nov. 12, 1987). But see *United States* v. *Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987). The government did not assert a demand for civil penalties under the amended version of the statute in the present case, however, and accordingly the only question before this Court concerns the constitutionality of the pre-1986 version of the statute.

2. Appellee was the manager of New City Medical Laboratories, Inc. (New City), which provided medical services for patients eligible for benefits under the federal Medicare program (App., *infra*, 6a). Providers under that program are entitled to federal reimbursement, at specified rates, for services rendered to Medicare recipients. From about January 1982 to December 1983, appellee submitted 65 different false claims for reimbursement to Blue Cross and Blue Shield of Greater New York (Blue Cross), a fiscal intermediary of the Department of Health and Human Services, which administers the Medicare program (*id.* at 7a).[4] Each of the 65 claims demanded payment of $12 for a service whose performance was actually reimbursable for only three dollars (*id.* at 7a-8a). Blue Cross was unaware of the misrepresentations, and it paid New City the full amount that it requested (*ibid.*). New City was thus overpaid by a total of $585.

When the government became aware of his fraud, appellee was indicted on 65 counts under the criminal false

[4] As the district court noted (App., *infra*, 8a), the fact that appellee submitted the false claims to an intermediary rather than directly to the government does not in any way shield him from liability under either the civil or the criminal false claims statute. Congress has now codified this rule. See 1986 Amendments § 2, 100 Stat. 3154 (to be codified at 31 U.S.C. 3729(c)).

claims statute (18 U.S.C. (1982 ed.) 287), which makes it a crime to "make[] or present[] * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."[5] On July 9, 1985, appellee was convicted on all 65 counts as well as 16 counts of mail fraud. He was fined $5000 and sentenced to two years' imprisonment. App., *infra*, 8a.

3. On April 11, 1986, the government commenced this civil action against appellee under the civil False Claims Act, 31 U.S.C. 3729-3731. At the time the action was instituted, that Act provided in pertinent part that a person who "knowingly presents, or causes to be presented [to the government] a false or fraudulent claim for payment or approval," or who "knowingly makes * * * a false * * * statement to get a false or fraudulent claim approved," "is liable to the United States Government for civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains * * * and costs of the civil action" (31 U.S.C. 3729(1), (2)). Because the statute provided for a civil penalty of $2000, the government sought a total civil penalty of $130,000, *i.e.*, $2000 for each of appellee's 65 violations.[6] The government also sought double damages ($1170) and costs.

In an initial opinion filed on April 29, 1987, the district court granted summary judgment for the government on

[5] Appellee was charged, tried, and sentenced under the pre-1986 version of this statute. Section 7 of the 1986 Amendments, 100 Stat. 3169, revised the wording of this statute but did not change the substance of the offense. See 18 U.S.C. (Supp. IV) 287.

[6] When a defendant submits several fraudulent demands for payment, in general each individual false payment demand gives rise to a separate false claim violation for purposes of the False Claims Act. See *United States* v. *Bornstein*, 432 U.S. at 309 n.4; S. Rep. 99-345, *supra*, at 8, 9; H.R. Rep. 99-660, *supra*, at 21.

the question of appellee's liability (App., *infra*, 6a). Noting that appellee's conviction under the criminal false claims statute "necessarily determined" (*id.* at 8a) that he had knowingly submitted false claims, the court ruled that appellee was collaterally estopped from denying liability in this civil action (*id.* at 9a).[7]

The court, however, declined to impose the civil penalty of $130,000 that the government had requested. Stating that "the amount by which the 65 claims were inflated was $9.00 for each claim, or [a total of] $585" (App., *infra*, 10a), the court declared that "the total amount necessary to make the Government whole bears no rational relation to the $130,000 penalty the Government seeks" (*ibid.*). The court regarded a civil penalty of $130,000 as disproportionate to appellee's total overbillings, and it suggested that such a penalty would constitute, in effect, a "criminal" punishment (*id.* at 9a, 10a). Because appellee had already been criminally convicted and sentenced for his commission of the acts on which this civil action is based, the court stated that appellee "would have a valid double jeopardy defense" (*id.* at 10a) if a penalty of $130,000 were imposed in this case.

Apparently because of its double jeopardy concerns, the court construed the statute to mean that "the imposition of a civil penalty of $2000 for each false claim [is not] mandatory" (App., *infra*, 10a). The court then determined that "a civil penalty of $2,000 on 8 of the 65 claims, or $16,000, will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action" (*ibid.*). Accordingly, the court imposed on appellee a $16,000 civil penalty (*id.* at 11a).

[7] The new, amended version of the statute contains an explicit collateral estoppel provision. See 1986 Amendments § 5, 100 Stat. 3158 (to be codified at 31 U.S.C. 3731(d)).

4. The government moved for reconsideration of the district court's decision pursuant to Fed. R. Civ. P. 59(e). The government argued that it was well established that the statute requires a separate civil penalty of $2000 for each false claim and that the court therefore lacked the discretion to award a penalty of less than $130,000 in this case. The court thereupon issued a new opinion and judgment (App., *infra*, 1a-5a, 12a), agreeing with the government's statutory interpretation but holding the statute unconstitutional as applied.

The court acknowledged that it had erred in interpreting the statute to allow less than a total civil penalty of $2000 for each statutory infraction (App., *infra*, 2a).[8] The court therefore revisited the double jeopardy concerns expressed in its previous opinion. It recognized (App., *infra*, 3a-4a, 9a) that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), this Court had held that the False Claims Act's $2000 penalty provision was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause. The court nevertheless found this case distinguishable on its facts from *Hess*, because "[t]he penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government" (App., *infra*, at 4a). Focusing on a perceived "tremendous disparity between actual damage and the 'civil penalty' in this case" (*ibid.*), the court repeated its earlier statement that a penalty of $130,000 in this case would "bear[] no rational relation to the Government's loss" (*id.* at 5a). The court concluded (*ibid.*):

> [T]he $130,000 penalty sought in this case amounts to a criminal penalty for violations for which Halper has already been punished.
>
> Judgment in this amount would violate the Double Jeopardy Clause. The statute, therefore, is unconstitutional as applied to Halper, and the sought-after relief of $130,000 must be denied.

The court limited the government's recovery to double damages ($1170) and costs, with no civil penalty at all (App., *infra*, 5a).

[8] The court stated in its amended opinion that "[t]he Government now has cited to compelling authority that, in the absence of Government consent, the $2,000 penalty for each false claim is mandatory" (App., *infra*, 1a-2a). See, *e.g.*, *United States* v. *Hughes*, 585 F.2d 284, 286 (7th Cir. 1978) ("This [$2000-per-false-claim] forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount."); *Brown* v. *United States*, 524 F.2d 693, 705-706 (Ct. Cl. 1975); *United States* v. *Cato Bros.*, 273 F.2d 153, 156 (4th Cir. 1959), cert. denied, 362 U.S. 927 (1960); *United States* v. *Jacobson*, 467 F. Supp. 507, 508 (S.D.N.Y. 1979). The Senate Judiciary Committee has recently reconfirmed this understanding of the pre-1986 statute (S. Rep. 99-345, *supra*, at 8 (emphasis added)):

> In its present form, the False Claims Act empowers the United States to recover double damages * * *. In addition, the United States may recover one $2,000 forfeiture for each false claim submitted in support of a claim. *The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false.* The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages.

THE QUESTION IS SUBSTANTIAL

The district court in this case has struck down as unconstitutional the statute "that has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4). The district court's holding—that the False Claims Act's civil penalty provision is really a "criminal" penalty provision in the circumstances of this case and therefore violates the Double Jeopardy Clause—is at odds with *United States ex rel. Marcus* v. *Hess*, *supra*, and *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), in which this Court rejected

the double jeopardy analysis that the district court adopted here.

The error in the district court's decision is not limited to its inconsistency with this Court's decisions in *Hess* and *Rex Trailer*. The district court's ruling also disregards Congress's recent amendments of the False Claims Act. Although the views of a subsequent Congress are, of course, not controlling with regard to the meaning of a prior enactment, they are nevertheless instructive. In amending this statute in 1986, Congress increased the civil penalties for false claims and explicitly reaffirmed that the statute's "civil penalties" are indeed civil, not criminal, for double jeopardy and other purposes. The district court's view that the civil penalty in this case is disproportionately harsh cannot be squared with Congress's view that even more severe penalties are appropriate. By characterizing the False Claims Act's civil penalties as "civil" in some cases and "criminal" in other cases, depending on the court's view of whether the penalty is proportionate to the magnitude of the defendant's fraud in the particular case, the theory embraced by the district court also threatens serious disruption of a statutory enforcement scheme that Congress recently reaffirmed in "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, *supra*, at 2).[9]

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[9] The district court's theory, if followed, would hamper the government's ongoing enforcement efforts not only under the False Claims Act, but also under other, similar statutory schemes that provide for civil penalties in addition to criminal sanctions. See, *e.g.*, *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding Civil Monetary Penalties Act, 42 U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim); *Mayers* v. *Department of Health & Human Services*, 806 F.2d 995, 999 (11th Cir. 1986) (holding same statute "civil"), cert. denied, No. 86-1887 (Oct. 5, 1987).

1. The district court's decision is inconsistent with this Court's decision in *United States ex rel. Marcus* v. *Hess*, *supra*. In *Hess*, various electrical contractors had engaged in a collusive bidding scheme on a federally funded public works project. They were convicted under the criminal false claims statute and fined $54,000 (317 U.S. at 545). An action was then brought against the same contractors under the civil False Claims Act.[10] The complaint sought the imposition of 56 civil penalties of $2000 each, for a total civil penalty of $112,000 (317 U.S. at 540). The defendants asserted that the civil suit was barred by the Double Jeopardy Clause on the ground that imposition of a civil penalty of $112,000 over and above the previous criminal fine would constitute a second criminal punishment for the same conduct (*id.* at 548).

This Court rejected the defendants' argument. The Court began with the premise that double jeopardy attaches only in a criminal proceeding (317 U.S. at 549 (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938))):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute in question] imposes a criminal sanction.

The Court then explained that, unlike the purpose of the criminal false claims statute, which is to punish wrongdoers and "to vindicate public justice" (*Hess*, 317 U.S. at 548-549), "the chief purpose of the [civil False

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[10] The civil action was brought by a private party, in the government's name, pursuant to the False Claims Act's *qui tam* provisions (31 U.S.C. 3730(b)).

Claims Act] was to provide for restitution to the government of money taken from it by fraud" (*id.* at 551).

The Court acknowledged that, in any particular case, the civil penalty of $2000 might exceed the amount of the fraud actually perpetrated on the government. But the Court emphasized that the statute—especially when considered in light of its criminal counterpart (see 317 U.S. at 549)—was clearly intended to provide a civil remedy, and that "[t]his remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered." *Id.* at 550. The Court concluded, therefore, that there was no merit to the defendants' argument "that the $2,000 'forfeit and pay' provision is 'criminal' rather than 'civil' " (*id.* at 551).[11]

This Court's holding in *Hess* was reiterated 13 years later in *Rex Trailer Co.* v. *United States, supra.* In *Rex Trailer*, the defendant was criminally convicted of using fraud in buying surplus war assets from the government and was fined $25,000 (350 U.S. at 149). After the criminal conviction, the government filed a civil action under the Surplus Property Act of 1944, 50 U.S.C. (1946 ed.) App. 1635, seeking the imposition of five civil penalties of $2000 each based on the same five acts of fraud that gave rise to the criminal proceeding. The defendant asserted that the previous criminal conviction posed a double jeopardy bar to the government's civil penalty proceeding (350 U.S. at 150).

As in *Hess*, this Court rejected the defendant's argument. "The only question for * * * decision," the Court observed, "is whether [the civil penalty provision] is civil

[11] The phrase "forfeit and pay" came from the language of the version of the civil False Claims Act then in effect, 31 U.S.C. (1940 ed.) 231, which provided that anyone who submits a false claim against the government "shall forfeit and pay to the United States the sum of two thousand dollars" plus double damages and costs.

or penal" (350 U.S. at 150). Noting that the Surplus Property Act's civil penalty provision was "virtually identical" (*id.* at 152 n.4) to the civil penalty provision in the False Claims Act that was upheld in *Hess*, the Court followed *Hess* and concluded that the $2000 civil penalty provision at issue was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause (*id.* at 152).

The defendant in *Rex Trailer* sought to bolster its argument by using the same argument that the district court employed in the present case: that the penalty was disproportionate to the government's actual loss under the circumstances of that case. Indeed, in *Rex Trailer* the defendant's fraud had not been shown to have resulted in any damages to the government (350 U.S. at 152). The Court rejected this effort to escape from *Hess*. Repeating *Hess*'s admonition that " '[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress' " (*ibid.* (quoting *Hess*, 317 U.S. at 552)), the Court explained that the $2000 civil penalty provision was essentially a "liquidated-damage" provision (350 U.S. at 151, 153). The fact that the civil penalty provision effectively served as a liquidated-damages clause, to provide a rough, across-the-board measure of the government's recovery, did not "transform[] what was clearly intended as a civil remedy into a criminal penalty" (*id.* at 154).

The district court's approach in this case cannot be squared with this Court's explicit rejection of the defendants' double jeopardy arguments in *Hess* and *Rex Trailer*. In characterizing the False Claims Act's penalties as "criminal," the district court in this case has adopted a position that this Court has already twice rejected. See *Berdick* v. *United States*, 612 F.2d 533, 538 (Ct. Cl. 1979) (citing *Hess*; "the forfeitures required by the False Claims

Act are civil, not criminal, * * * and the double jeopardy provisions of the Fifth Amendment do not apply").

The district court erred in its effort to distinguish *Hess*. Although "[t]he penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government" (App., *infra*, 4a; see *Hess*, 317 U.S. at 540), this Court's decision did not in any way turn on the amount of damages inflicted on the government in that particular case. Indeed, *Rex Trailer* expressly rejected the defendant's double jeopardy argument in the face of a contention that the government had suffered no loss at all.

Moreover, the district court's theory that a statute can be "civil" in some cases and "criminal" in others, depending on whether it leads (in the court's view) to a disproportionate sanction, would produce bizarre consequences. Consider two proceedings both brought under the False Claims Act, one involving a $112,000 penalty for 56 false claims costing the government $100,000 and the other involving a $130,000 penalty for 65 false claims costing the government $585. If the first proceeding is "civil" (following *Hess*) and the second is "criminal" (under the decision below), then in the second case—but not the first—the government would be required to prove its case beyond a reasonable doubt. Conversely, in the first case the defendant would be entitled to take discovery under the liberal provisions of the Federal Rules of Civil Procedure, but the defendant in the second case would be allowed only the more limited discovery available in criminal cases. Indeed, under the district court's theory a case might proceed to trial as a "civil" case only later to be held "criminal" (and to require more procedural safeguards) if the evidence developed at trial led the district court to question the "proportionality" of the civil penalty or if the court of appeals disagreed with the district court's conclusion that the penalty was not unduly disproportionate.

This Court's decisions do not support any such case-by-case analysis of whether a statute is "civil" or "criminal" in nature. To the contrary, once it is established that Congress intended to create a "civil" penalty, this Court "inquire[s] * * * whether the *statutory scheme* [i]s so punitive either in purpose or in effect as to negate [Congress's] intention." *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980) (emphasis added). The question whether this statutory scheme is so punitive as to be "criminal" was answered long ago in *Hess* and *Rex Trailer*. The district court's attempt to fashion a case-specific exception to those decisions warrants review and reversal.[12]

2. In two respects, Congress's recent amendment of the statute buttresses this Court's rulings in *Hess* and *Rex Trailer* that the False Claims Act's civil penalty provision is indeed "civil" and does not implicate double jeopardy concerns. First, Congress has now raised the civil penalty from $2000 per false claim to "not less than $5,000 and not more than $10,000" per false claim. 1986 Amendments § 2, 100 Stat. 3154 (to be codified at 31 U.S.C. 3729(a)). Congress's substantial increase of the statutory penalty weighs against the district court's suggestion that imposition of the smaller, preexisting $2000 penalty in this case

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[12] The civil penalty in this particular case is as large as it is not because Congress has provided for an excessive penalty, but because the defendant has defrauded the government 65 times. See *United States ex rel. Fahner* v. *Alaska*, 591 F. Supp. 794, 801-802 (N.D. Ill. 1984) (imposing civil penalty in excess of one million dollars for defendant's commission of more than 500 False Claims Act violations; "[w]hile the total damage award in this action may appear to be excessive, it reaches such proportions for the sole reason that [the defendant] has been found to have submitted 551 separate false claims").

is excessive. Second, in amending the False Claims Act, Congress explicitly reaffirmed that the civil penalty provision is intended to be a civil sanction. Congress's own characterization of the penalty as civil is entitled to great weight and militates against the district court's contrary conclusion that the sanctions would be "criminal" in this case.

a. Prompted by extensive findings that fraud "permeates generally all Government programs" (S. Rep. 99-345, *supra*, at 2)—particularly health-care benefit programs (*id.* at 4) such as the Medicare program involved in this case (*id.* at 21)—Congress revised the False Claims Act in 1986 "[i]n order to make the statute a more useful tool against fraud in modern times" (*id.* at 2). See also H.R. Rep. 99-660, *supra*, at 21. Congress determined that "[t]his growing pervasiveness of fraud necessitates modernization of" the Act (S. Rep. 99-345, *supra*, at 2) because "some of the provisions of the Act are outdated" (H.R. Rep. 99-660, *supra*, at 17). In particular (*ibid.*),

> the current law permits the United States to recover double damages plus $2,000 for each false or fraudulent claim. This penalty has not been changed since 1863. The Congressional Research Service has reported that, based on the Consumer Price Index, the buying power of $2,000 in 1863 would be close to $18,000, today.

Thus, emphasizing that it shared "the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments" (S. Rep. 99-345, *supra*, at 17), Congress decided to strengthen the civil penalties that the government is entitled to recover from those who "plunder[] * * * the public treasury"

(*United States* v. *McNinch*, 356 U.S. 595, 599 (1958)) by making false claims.

The amended version of the statute increased the civil penalty per false claim from $2000 to any amount in the $5000-to-$10,000 range and imposed triple rather than double damages. The legislative history of the amendment makes it clear that Congress strengthened the government's civil remedies because it determined that more severe sanctions were needed in order to stem the tide of rampant fraud inflicted on the government. See H.R. Rep. 99-660, *supra*, at 18 (estimating government's loss to fraud at "hundreds of millions of dollars to more than $50 billion per year"); S. Rep. 99-345, *supra*, at 3 (giving larger estimates and noting that "[t]he cost of fraud cannot always be measured in dollars and cents, however").[13] Given Congress's substantial increase of the amount of

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[13] Congress acted in order to deter those who would defraud the government as well as to compensate the government for its monetary and nonmonetary losses caused directly and indirectly by false claims. See, *e.g.*, H.R. Rep. 99-660, *supra*, at 18. Such a purpose was well within Congress's power in enacting civil remedies. As this Court wrote in *Hess*, 317 U.S. at 550-551 (citations and footnote omitted),

> Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." This Court has noted that the general practice in state statutes of allowing double or treble or even quadruple damages. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. The law can provide the same measure of damage for the government as it can for an individual.

the statutory civil penalty, coupled with the legislative determination that the increased amount was necessary to provide the government with an adequate weapon against the "pervasive" fraud in government programs (S. Rep. 99-345, *supra*, at 3), the district court erred by substituting its judgment for that of Congress as to the excessiveness of the smaller, $2000 civil penalties sought in this case.[14]

b. Congress's recent amendments not only increased the amount of the civil penalty to which the government is entitled, but in addition reaffirmed that the statute's civil penalties are indeed "civil." Referring to Congress's addition to the statute of a provision "to make clear that in civil fraud actions, the Government is required to prove all essential elements of the cause of action [only] by a preponderance of the evidence" (S. Rep. 99-345, *supra*, at 30-31; see 1986 Amendments § 5, 100 Stat. 3158 (to be codified at 31 U.S.C. 3731(c))), the Senate Judiciary Committee took pains to explain that False Claims Act proceedings are civil in nature (S. Rep. 99-345, *supra*, at 31). The Senate report makes explicit Congress's repudiation

[14] It bears emphasis that, in raising the civil penalty from $2000 per false claim to $5000 to $10,000 per false claim, Congress was aware that the civil penalty would be substantial in cases in which the defendant commits many violations. The Senate report speaks to this very situation (S. Rep. 99-345, *supra*, at 9):

> Each separate * * * "false payment demand" constitutes a separate claim for which a forfeiture shall be imposed * * *, and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable for a forfeiture for each such form that contains false entries even though several such forms may be submitted to the fiscal intermediary at one time.

See also H.R. Rep. 99-660, *supra*, at 21.

of the notion that "the civil False Claims Act is penal in nature" (*ibid.*), and highlights "[t]he Supreme Court's rejection of [that] premise in [*Hess*]" (*ibid.*).

Congress's own characterization of the civil penalties as "civil"—in the pre-1986 statute as well as in the recent amendment—is highly probative. This Court has made clear that when "Congress has indicated an intention to establish a civil penalty" (*United States* v. *Ward*, 448 U.S. at 248) as opposed to a criminal punishment, Congress's intention is entitled to great weight and is controlling unless "the statutory scheme [is] so punitive in purpose or effect as to negate that intention" (*id.* at 248-249). This Court has admonished, moreover, that "[i]n regard to this latter inquiry, * * * 'only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [it is really a criminal and not a civil provision]' " (*id.* at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960))). Thus, when it is asserted that a statute that Congress has clearly denoted as civil is in reality a criminal statute for one purpose or another, the question is "whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transform what was clearly intended as a civil remedy into a criminal penalty' " (*Ward*, 448 U.S. at 249 (quoting *Rex Trailer*, 350 U.S. at 154)). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984) (holding forfeiture proceeding under 18 U.S.C. 924(d) "civil" and rejecting double jeopardy claim); *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232, 235-237 (1972) (per curiam) (holding forfeiture proceeding under 19 U.S.C. 1497 "civil" and rejecting double jeopardy claim); *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding Civil Monetary Penalties Law, 42

U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim).

Especially in light of this Court's decisions in *Hess* and *Rex Trailer*, there is no basis in this case for countering the presumption that a statute ordinarily is deemed civil if Congress says it is. Indeed, the presumption in this case is particularly strong, not only because Congress has expressly labeled the False Claims Act a "civil" provision in the very language of the statute (31 U.S.C. 3729, 3730(a); see 1986 Amendments §§ 2, 3, 100 Stat. 3153-3154, 3154 (to be codified at 31 U.S.C. 3729(a), 3730(a)), but also because Congress has deliberately provided for a separate criminal analog to the False Claims Act, in 18 U.S.C. 287. "Congress labeled the sanction * * * a 'civil penalty,' a label that takes on added significance given its juxtaposition with the criminal penalties set forth in [another, separate statutory provision]" (*Ward*, 448 U.S. at 249). See *Hess*, 317 U.S. at 549 ("[t]he statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy"); *Helvering* v. *Mitchell*, 303 U.S. at 404 ("[t]he fact that the [statutory scheme] contains two separate and distinct provisions imposing sanctions [one civil and one criminal], and that these appear in different parts of the statute, helps to make clear the [civil] character of that here invoked").

Thus, Congress's recent changes to the False Claims Act confirm this Court's conclusion, in both *Hess* and *Rex Trailer*, that the Act's "civil penalty" (31 U.S.C. 3729) scheme does not implicate the Double Jeopardy Clause. The district court sought to distinguish *Hess* on the basis of the perceived disproportionality of the penalty in this case, but the distinction is unavailing. The government is entitled to recover a full civil penalty even in cases in which no money is paid out and there are no provable damages: "The United States is entitled to recover such forfeitures

solely upon proof that false claims were made, without proof of any damages." S. Rep. 99-345, *supra*, at 8; see *United States* v. *Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978) ("[a] false claim is actionable under the [False Claims] Act even though the United States has suffered no measurable damages from the claim").

Given the endemic abuse that Congress has found to exist in government programs such as Medicare, imposition of a civil penalty of $2000 ($5000 to $10,000 under the new statute) against an individual who defrauds the government is reasonable and is well within Congress's legislative power. Even when a defendant's false claim nets him little or no gain, the defendant's fraudulent conduct imposes on the government an "extremely costly" burden of investigation and prosecution. *Mayers* v. *Department of Health & Human Services*, 806 F.2d 995, 999 (11th Cir. 1986) (upholding administrative imposition of civil penalty of close to two million dollars in Medicare fraud case brought under the Civil Monetary Penalties Act), cert. denied, No. 86-1887 (Oct. 5, 1987); cf. *Hess*, 317 U.S. at 552 (stressing "the inherent difficulty of choosing a proper specific sum which would give full restitution"). The civil penalty in this case is substantial not because Congress has provided for an excessive sanction, but because the defendant has defrauded the government 65 times. That appellee cheated the government many times does not transform the government's civil remedy into a criminal punishment.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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Attorneys

FEBRUARY 1988

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA

- against -

IRWIN HALPER, DEFENDANT

[Filed July 28, 1987]

OPINION

SWEET, D. J.

By opinion dated April 23, 1987, this court granted summary judgment in favor of the United States (the "Government") and against defendant *pro se* Irwin Halper ("Halper") on sixty-five claims of Medicare fraud under the False Claims Act, 31 U.S.C. §§ 3729-3731. Although the Government asked for a sum of $130,000, or a $2,000 "civil penalty" for each of the sixty-five false claims, as provided by 31 U.S.C. § 3729, this court imposed a penalty of $16,000. The Government now moves for an order granting reargument pursuant to Local Civil Rule 3(j) and amendment of the judgment pursuant to Fed.R.Civ.P. 59(e) to grant it the full amount sought in the complaint. The motion for reargument is hereby granted, and the judgment will be amended in accordance with this opinion.

In the April 23 opinion, this court, noting that the Government had not briefed the issue, concluded that the imposition of a civil penalty of $2,000 for each claim is not mandatory under § 3729. The Government now has cited to compelling authority that, in the absence of Govern-

ment consent, the $2,000 penalty for each false claim is mandatory. *See United States v. Diamond*, No. 86 Civ. 2121 (S.D.N.Y. April 14, 1987) (Walker, J.); *United States v. Jacobson*, 467 F. Supp. 507, 508 (S.D.N.Y. 1979) (Weinfeld, J.); *United States v. Hughes*, 585 F.2d 284, 286 (7th Cir. 1978); *Brown v. United States*, 524 F.2d 693, 705-06 (Ct. Cl. 1975); *cf. United States v. McLeod*, 721 F.2d 282, 285 (9th Cir. 1983); *United States v. Dinerstein*, 362 F.2d 852, 855-56 (2d Cir. 1966); *United States v. Rapoport*, 514 F. Supp. 519, 523 (S.D.N.Y. 1981) (Goettel, J.); *United States v. Silver*, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 505 (2d Cir. 1975). *But see Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975). The Government effectively distinguishes the case cited by the court, *United States v. Greenberg*, 237 F. Supp. 439 (S.D.N.Y. 1965) (Feinberg, J.), on the grounds that the Government took the position in *Greenberg* that the "number of forfeitures is within the discretion of the court." *Id.* at 445. Thus, this court concludes that it was in error and that the imposition of $2,000 for each of the sixty-five false claims is mandatory.

Nevertheless, a $130,000 sanction cannot be imposed, since such imposition in the present circumstances would violate the Double Jeopardy Clause.

The Fifth Amendment guarantee against double jeopardy protects against 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction, and 3) multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The protection against multiple punishments is implicated here, since Halper has already been convicted of criminal charges and sentenced to two years and a $5,000 penalty for these same acts. As the

Supreme Court said in *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168, 173 (1874):

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. . . . [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

Of course, the application of a penalty that is more than the "precise amount of so-called actual damage" is not necessarily punishment. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550 (1943). In *Hess*, the Supreme Court distinguished between "civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice." *Id.* at 548-49. Only those actions intended to vindicate public justice are to subject the defendant to double jeopardy. The court concluded that the provision under the predecessor statute to the False Claims Act allowing for double damages and a $2,000 penalty was remedial in nature. The Court noted that federal and state statutes have allowed treble and even quadruple damages, and that Congress could stay within the common law tradition and impose punitive damages. *Id.* at 550. Most importantly, the Court concluded that "the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *Id.* at 551-52.

The Court obviously gave great deference to Congress' intent in enacting the statute, focusing on the remedial purpose of the statute in concluding that it was not punitive. This court, of course, is bound by the Supreme

Court's conclusion that the statute was meant to be remedial. Nevertheless, the *Hess* Court did not stop with an analysis of Congress' intent; instead, it inquired, in the words of Justice Frankfurter's concurrence, into whether the penalty was punitive because it exceeded any amount "that could reasonably be regarded as the equivalent of compensation for the Government's loss." *Id.* at 554 (Frankfurter, J., concurring). The opinion of the Court examined the effect of the penalty, and stated:

> We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.

Hess, 317 U.S. at 549 (*citing Helvering v. Mitchell,* 303 U.S. 391, 401 (1983)). The penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government.

In the present case, we *can* say, in the words of *Hess,* "that the remedy now before us . . . will do more than afford the government complete indemnity for the injuries done it." The government cites no cases involving sums that even begin to approach the tremendous disparity between actual damage and the "civil penalty" in this case. *See Berdick v. United States,* 612 F.2d 533, 538 (Ct.Cl. 1979) (penalty of $72,000 where actual loss approximated $1,546); *Murray & Sorenson, Inc. v. United States,* 207 F.2d 119, 122-23 (1st Cir. 1953) (penalty unreported). Concededly, most of the cases have not examined the amount of the penalty in terms of its relationship to actual loss. *But see Peterson v. Richardson,* 370 F. Supp. 1259, 1267 (N.D. Texas 1973), *aff'd sub nom. Peterson v. Weinberger,* 508 F.2d 45 (5th Cir.), *cert. denied,* 423 U.S. 830 (1975).

Neverthless, a penalty of $130,000 for an out-of-pocket loss by the Government of $585, not including the expense of investigating and prosecuting this defendant, is "punishment." As stated in the April 24 opinion, "a civil penalty designed to make the government whole cannot be entirely unrelated to actual damages suffered and expenses incurred by the government." A penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss. Thus, the $130,000 penalty sought in this case amounts to a criminal penalty for violations for which Halper has already been punished.

Judgment in this amount would violate the Double Jeopardy Clause. The statute, therefore, is unconstitutional as applied to Halper, and the sought-after relief of $130,000 must be denied. The provision for double damages, however, remedying the difficulty of calculating the Government's losses and expenses, passes Double Jeopardy scrutiny, and will be applied to give the Government judgment in the amount of two times $585, or $1,170, and the costs of the civil action.

The judgment will be amended in accordance with this opinion.

IT IS SO ORDERED.

New York, N.Y.
July 27, 1987

/s/ R. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA

- against -

IRWIN HALPER, DEFENDANT

[Filed Apr. 24, 1987]

OPINION

SWEET, D. J.

In this action brought by the United States (the "Government") against the defendant *pro se* Irwin Halper ("Halper") for the filing of allegedly inflated Medicare claims in violation of the False Claims Act, 31 U.S.C. §§ 3729-3731, the Government has moved for summary judgment. Because Halper is collaterally estopped from denying the facts which entitle the Government to judgment in its favor, the motion for summary judgment is granted.

The following findings and conclusions are made on the affidavit, memorandum of law, and exhibits submitted by the Government, and the letter in opposition from Halper dated January 10, 1987.

The Facts

At all times relevant to the complaint, Halper was manager of New City Medical Laboratories, Inc. ("NCML"), a corporation providing medical services to patients eligible for Medicare. Since January, 1982, pro-

viders of Medicare services have been instructed to use certain billing procedure codes on claims filed with Blue Cross and Blue Shield of Greater New York ("Blue Cross"), the fiscal intermediary of the United States Department of Health and Human Services. Blue Cross made available to each provider manuals listing the Medicare procedure code corresponding to each type of medical service and the cost Medicare would pay to providers for that service.

In addition to the procedure codes corresponding to each particular medical service, the manual specified two procedure codes to be included on Medicare claim forms for additional reimbursement to providers who had to travel to a private home, a nursing home or a Skilled Nursing Facility to perform a medical service. The "9018" procedure code was the proper code for seeking reimbursement for services performed on the first or only patient seen at such a facility. The "9019" procedure code was the proper code for seeking reimbursement for services performed on each subsequent patient seen on the same day at the same facility. According to the manuals, at all relevant times, the reimbursement allowed by Medicare for services billed under the "9018" code was either $10.00 or $12.00, and the reimbursement allowed by Medicare for services billed under the "9019" code was $3.00.

From in or about January, 1982 until in or about December, 1983, Halper submitted 65 claim forms that falsely characterized certain services performed by NCML as services reimbursable under the higher-priced "9018" procedure code rather than the "9019" code, even though they were performed not on the first or only patient but on subsequent patients at a particular facility on a particular day. Blue Cross, unaware of the foregoing circumstances, made payment on the Medicare claims at the higher "9018"

rate when the claims should have been paid at the lower "9019" rate.

On July 9, 1985, Halper was convicted of 65 counts of submitting false claims in violation of 18 U.S.C. §§ 2 and 287, based on the same acts alleged in the complaint in the present action. He was sentenced to two years and a fine of $5,000.

Collateral Extoppel

The False Claims Act is violated by anyone not a member of the armed services of the United States who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." 31 U.S.C. § 3729(2). The fact that Halper submitted false claims to Blue Cross, the Government's fiscal intermediary, rather than directly to the Government, is of no significance. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 544-45 (1943); *United States v. Bornstein,* 361 F. Supp. 869, 875 (D.N.J. 1973), *aff'd in relevant part,* 504 F.2d 368 (3d Cir. 1974), *rev'd on other grounds,* 423 U.S. 303 (1976). The elements of the criminal false claims statute, 18 U.S.C. § 287, under which Halper was convicted, are identical to 31 U.S.C. § 3729(2) in all relevant respects. The criminal statute makes it a crime to present to the Government "any claim upon or against the United States, or any department or agency thereof, knowing such claims to be false, fictitious or fraudulent."

In this civil case, the Government can rely on the criminal conviction obtained against Halper to establish issues which were necessarily determined by the judgment of conviction. *United States v. Greenberg,* 237 F. Supp. 439, 442 (S.D.N.Y. 1965). Since the conviction necessarily determined that Halper submitted claims to the Government "knowing such claims to be false, fictitious, or fraud-

ulent," Halper cannot challenge that finding on this motion for summary judgment. *See United States v. Thomas,* 709 F.2d 968, 972 (5th Cir. 1983) ("Because of the existence of a higher standard of proof and greater procedural protection in a criminal prosecution, a conviction [under the criminal false claims statute] is conclusive as to an issue arising against the criminal defendant in a subsequent civil action"); *Berdick v. United States,* 612 F.2d 533, 537 (Ct.Cl. 1979); *Sell v. United States,* 336 F.2d 467, 474-75 (10th Cir. 1964). Since Halper is collaterally estopped from creating a genuine issue of material fact, the Government is entitled to summary judgment under the False Claims Act.

Damages and Forfeiture

Title 31 U.S.C. § 3729 provides that a person who knowingly makes a false statement to get a false claim approved "is liable to the United States Government for a civil penalty of $2,000, an amount equal to two times the amount of damages the Government sustains because of the act of that person, and the costs of the civil action . . . ."

The Supreme Court has held that a provision for a civil penalty of $2,000 plus twice the Government's damages is not in itself a criminal penalty giving rise to a claim of double jeopardy, reasoning that the purpose of such a provision is to ensure that the Government is fully compensated for any damages it has incurred. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 548-52 (1943); *Berdick v. United States, supra,* 612 F.2d at 538; *Murray & Sorenson, Inc. v. United States,* 207 F.2d 119, 122-23 (1st Cir. 1953). Therefore, the standard for determining whether a penalty is criminal is not whether the Government can prove that the penalty imposed is equal to the Govern-

ment's actual damages. Instead, a court must take into account the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages. Nevertheless, a civil penalty designed to make the Government whole cannot be entirely unrelated to actual damages suffered and expenses incurred by the Government.

Were this court to grant the relief the Government seeks, the statute as applied would violate the Double Jeopardy Clause. The Government seeks to recover $130,000, representing the $2,000 allotted by statute for each of the 65 false claims set forth in the complaint. At most, however, the amount by which the 65 claims were inflated was $9.00 for each claim, or $585. Even adding to that amount the Government's expense in investigating and prosecuting this action, the total amount necessary to make the Government whole bears bear no rational relation to the $130,000 penalty the Government seeks. *See Peterson v. Richardson*, 370 F. Supp. 1259, 1267 (N.D.Texas 1973), *aff'd*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975).

Although the Government has not briefed the issue, the imposition of a civil penalty of $2,000 for each false claim does not appear to be mandatory under the statute. *See United States v. Greenberg*, 237 F. Supp. 439, 445 (S.D.N.Y. 1965). If it were, under the circumstances of this case, Halper would have a valid double jeopardy defense, *Hess, supra*, 317 U.S. 537, notwithstanding. Of course, not considered in this determination is the $5,000 criminal fine already imposed on Halper for deterrence and as a penalty. However, a civil penalty of $2,000 on 8 of the 65 claims, or $16,000, will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action.

Although this is at best an approximation of the amount required to make the Government whole, the Government, in keeping with the relief it seeks, has submitted no evidence of its expenses in this action.

Therefore, summary judgment in the amount of $16,000 is granted in the Government's favor.

IT IS SO ORDERED

DATED: New York, N.Y.
April 23, 1987

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA, PLAINTIFF

- against -

IRWIN HALPER, DEFENDANT

[Filed Oct. 21, 1987]

AMENDED JUDGMENT

Plaintiff having moved for reargument and for amendment of the judgment filed on May 1, 1987, and the Court having granted the motion to reargue and having issued an opinion dated July 27, 1987 reducing plaintiff's damage award to $1,170, it is hereby ORDERED, ADJUDGED and DECREED that the judgment filed on May 1, 1987 is vacated and that plaintiff is hereby awarded judgment in the amount of $1,170 against defendant.

New York, New York
October 20, 1987

/s/ Robert W. Sweet
ROBERT W. SWEET
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA, PLAINTIFF

v.

IRWIN HALPER, DEFENDANT

[Filed Nov. 19, 1987]

**NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES**

Notice is hereby given that the plaintiff, the United States of America, hereby appeals to the Supreme Court of the United States from the judgment of this Court filed in the above-captioned matter on October 21, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1252 and 28 U.S.C. § 2101(a).

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General
RUDOLPH W. GIULIANI
United States Attorney

/s/ Michael Jay Singer
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NOVEMBER 1987

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA

- against -

IRWIN HALPER, DEFENDANT

[Filed Oct. 28, 1987]

JUDGMENT

SWEET, D. J.

Pursuant to this court's opinion of July 27, 1987, amending an earlier opinion of April 23, 1987, judgment will be entered in this case in the amount of $1,170.00 in accordance with the July 27 opinion with costs.

IT IS SO ORDERED

New York, N.Y.
October 26, 1987

/s/ Robert W. Sweet

ROBERT W. SWEET
U.S.D.J.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60280

(3)

No. 87-1383

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED FEBRUARY 17, 1988
PROBABLE JURISDICTION NOTED JUNE 13, 1988

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1383

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

TABLE OF CONTENTS

The following opinions, judgments, and notice of appeal have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed jurisdictional statement:

UNITED STATES DISTRICT COURT DOCKET

UNITED STATES OF AMERICA, PLAINTIFF

v.

HALPER, IRWIN
HALPER, MORRIS, DEFENDANTS

IRWIN HALPER
MORRIS HALPER, M.D., DEFENDANT-THIRD PARTY

against

ROBERT HALPER, THIRD PARTY DEFENDANT

CAUSE

Purs. to 31 U.S.C. §§ 3729-3731—(False Claims Act)—Action for fraud in the filing of Medicare claim forms—

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For: Morris Halper

DATE	NR.	PROCEEDING
04-11-86	01	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C.636(c).
04-17-86	02	Fld. Pltf. Demand for Jury Trial.
05-02-86	03	Filed summons with acknowledgment of service of Complaint by mail served: Irwin Halper on 4-14-86 Morris Halper, N.D. on 4-14-86
05-08-86	03	Filed ANSWER of deft, Irwin Halper nd demand for tral by jury.
05-29-86	04	Filed stip. and order ext. deft. Morris Halper, M.d.'s time to answer to 6-2-86—Sweet, J.
06-03-86	05	Filed ANSWER, Crossclaim and Jury Demandof deft., Morris Halper
06-10-86	06	Filed pltffs notice of taking deposition of deft, Morris Haloer ib 7-29-86
06-10-86	07	Fld. PRETRIAL ORDER. . . that counsel are directed to meet and discuss settlement,p/t discovery and all preliminary matters etc. So Ordered. SWEET, J.
06-11-86	08	Filed THIRD PARTY COMPLAINT by defeendant-Third Plaintiff, Morris Halper c/m
07-14-86	09	Filed ANSWER and denial of Crossclaim for Contribution and Indemnification and demand for trial by jury be deft. Irwin Halper
07-16-86	10	Filed pltff's notice of taking deposition of Irwin Halper on 7-31-86.

DATE	NR.	PROCEEDING
07-16-86	11	Filed pltffs Amended notice of taking deposition of deft. Morris Halper on 7-31-86.
09-03-86	12	Filed Memorandum—from pro se Writ Clerk to Judge Sweet with memo. end. granting H leave to file the attached papers—Sweet, J. c/m 9-4-86
09-04-86	13	Filed ANSWER of deft. Irwin Halper to pltff's First Set of interrog. and requests for documents
09-03-86	14	Filed Memo. to Judge Sweet from Pro se Writ Clerk with memo. end. granting deft. leave to file the attached paper—Sweet, J. c/m 9-4-86
09-04-86	15	Filed deft. Irwin Halper's interrog.
09-04-86	16	Filed deft. Answer to Request for production of document
10-17-86	17	Filed stip. and order of dismissal as to deft. Morris Halper pursuant to rule 41(a) (1)—Sweet, J.
12/16/86	18	Fld. MEMO ENDORSED on letter to J. Sweet from Amy Rothstein. . . we request that we be permitted until 1/9/87 to file our motion papers GRANTED. SO ORDERED SWEET, J.
01-08-87	19	Filed pltff's declaration and notice of motion for summary judgment pursuant to rule 56 (a) ret. 2-13-87
01-08-87	20	Filed pltff's statement pursuant to rule 3(g). orig. to chambers

DATE	NR.	PROCEEDING
01-08-87	21	Filed pltff's memo. of law in support of pltff's Motion for summar orig. to chambers
04-24-87	22	Filed OPINION # 60879. Therefore summary judgment in the amount of $16,000 is granted in the Government's favor.—Sweet, J. (cmc) date unknown
04-27-87	23	Filed pro se deft. Irwin Halper Letter to Judge Sweet undated (Rec in chambers 1-14-87) requesting that this letter be my reply to the papers I received from the government's agent Amy Rothstein fld.
04-30-87	24	Filed pltff's Notice of Motion for Re-argument . . . for an order granting reargument purs to Local rule 3(j).
04-30-87	25	Filed pltff's Memorandum of law in support of its motion to reargue. orig. to chambers
05-01-87	26	Filed JUDGMENT Pursuant to this court's opinion of April 23, 1987, this case dismissed with prejudice and without costs.—Sweet, J. ent. 5-4-87 (cmc) date unknown.
05-05-87	27	Filed pltff's Amended Notice of Motion for Reargument and Amendment of the Judgment pursuant to rule 3(j) and rule 3(j). ret. 5-15-87.

DATE	NR.	PROCEEDING
07-28-87	28	Filed OPINION #61314: Judgment in this amount would violate the Double Jeopardy Clause. The statute is therefore unconstitutional as applied to deft Halper and the sought-after relief of $130,000 must be denied. The provision for double damages passes Double Jeopardy scrutiny and will be applied to give the Govt. judgment in the amt of $1,170 and the costs of the civil action. The judgment will be amended in accordance with this opinion. . . So Ordered. .Sweet, J. cmc AL
08-27-87	29	Fld. NOTICE OF APPEAL to the Supreme Court of the United States from the opinion and order of this court filed in the above matter on 7-28-87. Sent; copies to; Mr. Irwin Halper Six Sterling Road Armonk, NY 10504 Foward copy of appeal to district Judge. Original Appeal to Orders & Appeals with two copies of Docket Sheet. KY
10-21-87	30	Fld. AMENDED JUDGMENT #87,1916 Ordered that the judgment filed on 5-1-87 is vacated and that Pltff is awarded in the amount of $1,170. against deft. SWEET,J. EOD 10-27-87 Mailed Court of appeal letter & forms in re; Appeal procedure to;

DATE	NR.	PROCEEDING
10-28-87	31	Fld. JUDGMENT Ordered that purs to this courts opinion of 7-27-87 amending an earlier opinionof 4-23-87 judgment will be entered in this case in the amount of $1,170.00 in accordance with the July 27 opinion with costs. .SWEETNJ. cm EOD 10-27-87
11-19-87	32	Fld. NOTICE OF APPEAL to Supreme court of the US from the judgement entered of 10-21-87 mailed copies of appeals to Irwin Halper Six sterling Road Armonk nY 10 forward copy of appeal to DISTRICT Judge Original appeal with 2 copies of docket to orders and appeals and copy of judgment. kr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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85 CRIM. 247

UNITED STATES OF AMERICA

v.

IRWIN HALPER, DEFENDANT

INDICTMENT

[Filed Apr. 26, 1985]

COUNTS ONE THROUGH SIXTEEN

The Grand Jury charges:

INTRODUCTION

At all times relevant to this Indictment:

1. On July 30, 1965, Congress enacted the Medicare Program under Title XVIII of the Social Security Act. The Medicare Program provides, *inter alia,* for basic insurance coverage for in-hospital and out-patient medical services for individuals who are 65 years of age and over and to certain other persons entitled to Social Security benefits because of disability.

2. Blue Cross and Blue Shield Inc. of Greater New York ("Blue Cross"), 622 Third Avenue, New York, New York, administered the Medicare Program in Manhattan, Bronx, Staten Island, Rockland, and Westchester pursuant to its contract with the United States Department of Health and Human Services ("HHS"). Blue Cross served

as a fiscal intermediary to approve and pay claims filed by providers of Medicare services, such as laboratories, hospitals, and physicians. Each Medicare claim from a provider was processed by Blue Cross, and Blue Cross, as agent for HHS, then issued a check to the provider for all approved services.

3. Providers of Medicare services under the supplementary medical insurance benefits program (Medicare "Part B") filed claims with Blue Cross for payments on standardized Medicare claim forms. On each such form, a provider was instructed to fill in, *inter alia,* its name and address, the date on which the medical services were performed, the appropriate code for the place at which the services were performed (e.g., "O" for Doctor's Office, "H" for Patient's Home, "NH" for Nursing Home, "SNF" for Skilled Nursing Facility), the patient's name, a description of the medical services performed, including the billing procedure code for those services (see paragraphs 4 and 5 below), and the provider's charges for the services performed.

4. As part of the description of the medical services performed, the provider was instructed to include on the claim forms the Medicare procedure code that corresponded to each medical service. The Medicare procedure code was found in manuals made available to each provider by Blue Cross, listing the procedure code corresponding to each type of medical service and the cost Medicare would pay to providers for that service.

5. In addition to the procedure codes corresponding to each particular medical service, the manuals also specified two procedure codes to be included on Medicare claim forms so that the provider could receive additional reimbursement for performing a medical service when he had to travel to a private home, a nursing home or a Skilled Nursing Facility to perform that service. The "9018" procedure code was the proper code for seeking reimbursement for services performed on the *first* or *only* patient seen at a private home, a nursing home or a Skilled Nursing Facility. The "9019" procedure code was the proper code for seeking reimbursement for services performed on each *subsequent* patient seen on the same day at the same facility. According to the manuals, at all times relevant to the Indictment, the reimbursement allowed by Medicare for services billed under the "9018" code was either $10.00 or $12.00, and the reimbursement allowed by Medicare for services billed under the "9019" code was $3.00.

6. IRWIN HALPER, the defendant, was the manager of the New City Medical Laboratories, Inc. ("NCML"), 345 North Main Street, New City, New York 10956, whose employees provided medical services to patients at, *inter alia,* the following two facilities pursuant to contracts between NCML and those two facilities: Friedwald House, New Hempstead Road, New City, New York and Riverside Nursing Home, Route 9W, Haverstraw, New York.

STATUTORY ALLEGATIONS

7. From in or about January 1982, until in or about December 1983, in the Southern District of New York, IRWIN HALPER, the defendant, unlawfully, wilfully, and knowingly would and did devise and intend to devise a scheme and artifice to defraud the Medicare Program and to obtain money by means of false, fictitious and fraudulent pretenses, representations, and promises.

8. It was a part of said scheme and artifice to defraud that the defendant IRWIN HALPER would and did file and cause to be filed with Blue Cross Medicare claims charging for services that the defendant characterized and caused to be characterized falsely, fictitiously, and fraudulently in order to obtain higher fees.

9. Among the means that the defendant IRWIN HALPER would and did use in carrying out the scheme and artifice to defraud were the following:

(a) During the period covered by the Indictment, the defendant IRWIN HALPER, falsely, fictitiously and fraudulently, would and did fill out and cause to be filled out Medicare claim forms using the higher-priced "9018", rather than the lower-priced "9019", billing procedure code for numerous patients served at an NH facility on a particular day, when in truth and in fact, as the defendant well knew, the "9018" code could only properly be used for the *first* or *only* patient served at an NH facility on a particular day;

(b) The defendant IRWIN HALPER would and did submit and cause to be submitted by mail to Medicare through Blue Cross, the false, fictitious and fraudulent Medicare claim forms referred to in paragraph (a);

(c) By submitting and causing to be submitted those false, fictitious, and fraudulent Medicare claim forms, the defendant IRWIN HALPER would and did cause checks to be mailed to NCML by Medicare through Blue Cross, providing reimbursement in an amount which was higher than that to which NCML was entitled.

10. For the purpose of executing and attempting to execute the scheme and artifice to defraud set forth in paragraphs 1 through 9 of this Indictment, on or about the dates set forth in Counts 1 through 16 below, in the Southern District of New York, the defendant IRWIN HALPER placed and caused to be placed in post offices and authorized depositories for mail, and knowingly caused to be delivered according to the directions thereon, letters containing checks, made payable to New City Medical Laboratories, Inc., 345 North Main Street, New City, New York 10956, which are hereinafter described in

Counts 1 through 16, in payment of the false, fictitious and fraudulent claims he had submitted and caused to be submitted to Medicare through Blue Cross.

Count	Check Number	Date of Check/ Approximate Date of Mailing
1	53602611	3/8/82
2	53619135	3/15/82
	53619136	3/15/82
3	53651294	3/29/82
4	53666496	4/2/82
5	53898706	7/2/82
6	53912746	7/12/82
	53912747	7/12/82
	53912748	7/12/82
7	53930125	7/19/82
8	54383978	1/10/83
	54383979	1/10/83
9	54425682	1/24/83
	54425683	1/24/83
10	54444766	1/31/83
	54444767	1/31/83
	54444769	1/31/83
	54444770	1/31/83
11	54462045	2/4/83
	54462046	2/4/83
	54462047	2/4/83
	54462048	2/4/83
12	54479169	2/14/83
13	54496301	2/22/83
	54496303	2/22/83
14	54546275	3/14/83
15	55982037	1/20/84
	55982038	1/20/84
	55982039	1/20/84
16	56037619	2/3/84

(Title 18, United States Code, Sections 1341 and 2.)

COUNTS SEVENTEEN THROUGH EIGHTY-ONE

The Grand Jury further charges:

11. Paragraphs 1 through 6 of this Indictment are hereby incorporated by reference and re-alleged as though fully set forth herein.

12. From in or about January 1982, until in or about December 1983, in the Southern District of New York, IRWIN HALPER, the defendant, unlawfully, wilfully, and knowingly did make and present, and did cause to be made and presented, to a department and agency of the United States to wit, the Department of Health and Human Services through its fiscal intermediary Blue Cross, certain false, fictitious, and fraudulent claims for payment upon and against the United States, to wit, the Medicare claims described in Counts 17 through 81 below, which falsely, fictitiously and fraudulently characterized medical services performed by NCML on all the patients listed below, on each day listed below, at the particular NH facility listed below, as services reimbursable under the higher-priced "9018" procedure code, when in truth and in fact, as the defendant IRWIN HALPER well knew, only medical services performed on the *first* or *only* patient at a particular NH facility on a particular day were services reimbursable under the "9018" procedure code:

Count	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
17	1/12/82	Friedwald	Curtis	1205622763	2/16/82
18	1/12/82	"	Smith	1206729223	3/4/82
19	1/12/82	"	Hindle	1205301945	2/16/82
20	1/12/82	"	Hausner	1205301931	2/16/82
21	1/12/82	"	Hendelman	1206728688	2/16/82
22	6/2/82	Riverside	McCabe	1216926347	6/14/82
23	6/2/82	"	Paider	1216926338	6/14/82
24	6/2/82	"	Decker	1217228947	6/14/82
25	6/2/82	"	Geiger	1216926195	6/14/82
26	6/2/82	"	Hasko	1216926199	6/14/82
27	6/2/82	"	Kogan	1216926197	6/14/82
28	12/6/82	Riverside	Koepping	3300536037	12/30/82
29	12/6/82	"	Johnson	3300536034	12/30/82
30	12/6/82	"	Fein	3300536036	12/30/82
31	12/6/82	"	Tracy	1301228964	1/7/83
32	12/6/82	"	Graff	3234735129	12/9/82
33	12/6/82	"	Rose	3301237116	1/7/83

Count	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
34	12/6/82	"	Martinez	3234735131	12/9/82
35	12/6/82	"	LaPlace	3234735101	12/9/82
36	12/6/82	"	Yonko	3234735128	12/9/82
37	12/6/82	"	Clark	3234735100	12/9/82
38	12/14/82	Friedwald	Greenberg	3302036851	1/17/83
39	12/14/82	"	McArdle	3302036860	1/17/83
40	12/14/82	"	Klein	3302036856	1/17/83
41	12/14/82	"	LaBlang	3305333910	1/17/83
42	12/14/82	"	Schweitzer	1301705517	1/12/83
43	12/14/82	"	Feldman	3302036864	1/17/83
44	12/14/82	"	Storm	1301705518	1/12/83
45	12/14/82	"	Gottlieb	3301735187	1/12/83
46	12/14/82	"	Bernstein	3302036857	1/17/83
47	12/14/82	"	Miller	3302036859	1/17/83
48	12/14/82	"	Slater	3302036858	1/17/83
49	12/14/82	"	Rones	3302036861	1/17/83
50	12/14/82	"	Hendelman	3302036855	1/17/83
51	12/14/82	"	Toffel	3301735186	1/12/83

Count	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
52	12/16/82	Friedwald	Edelson	3302136157	1/18/83
53	12/16/82	"	Gladstain	3302036853	1/17/83
54	12/16/82	"	Breisacher	1302126807	1/18/83
55	12/16/82	"	Goldberger	3302136169	1/18/83
56	12/16/82	"	Hauseman	1302126799	1/18/83
57	12/16/82	"	Berel	1302126801	1/18/83
58	12/16/82	"	Eiss	3302036850	1/17/83
59	12/16/82	"	Patrick	1302126800	1/18/83
60	12/16/82	"	Habish	3302036949	1/17/83
61	12/16/82	Friedwald	Nagelberg	3302136158	1/18/83
62	12/16/82	"	Bernstein	3302136168	1/18/83
63	12/16/82	"	Lipschitz	3302136163	1/18/83
64	12/16/82	"	Leon	3302136160	1/18/83
65	12/16/82	"	Mead	3302036852	1/17/83
66	12/16/82	"	Hindle	3302136170	1/18/83
67	12/16/82	"	Pfarrer	3302136164	1/18/83
68	12/16/82	"	Mayer	3302136156	1/18/83
69	12/16/82	"	Hausner	3302136167	1/18/83

Count	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
70	12/16/82	Friedwald	Dorrien	1302126806	1/18/83
71	12/16/82	"	Adler	3302136159	1/18/83
72	12/16/82	"	Toffel	3302136166	1/18/83
73	12/28/83	Riverside	Glassing	8336420570	12/28/83
74	12/28/83	"	Decker	8336420576	12/28/83
75	12/28/83	"	Geiger	8336420847	12/28/83
76	12/28/83	"	Merlmelste	8336420572	12/28/83
77	12/28/83	"	Martin	8336420845	12/28/83
78	12/28/83	"	Gannon	8336420516	12/28/83
79	12/28/83	"	Villa	8336420571	12/28/83
80	12/28/83	"	Lynch	8336420569	12/28/83
81	12/28/83	"	Kerr	8336420568	12/28/83

(Title 18, United States Code, Sections 287 and 2.)

FARRELL L. McCLANE
FARRELL L. McCLANE
Foreperson

/s/ RUDOLPH W. GIULIANI
RUDOLPH W. GIULIANI
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 CRIM. 0247 (LPG)

UNITED STATES OF AMERICA

vs.

IRWIN HALPER, DEFENDANT

[Filed July 9, 1985]

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government AUSA Jim Bevita the defendant appeared in person on this date 7/9/85

COUNSEL

WITH COUNSEL MICHAEL K. EDELMAN

FINDING & JUDGMENT

There being a verdict of guilty on all counts 1 through 81. Defendant has been convicted as charged on the offense(s) of mail fraud, submitting false claims. (Title 18, U.S.C., Secs 1341 and 2.) (Title 18, U.S.C., Secs 287 and 2.)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of counts 1 through 16,

each to run concurrent to each other. Two (2) years on each of counts 17 through 81 each to run concurrent to each other and concurrent to counts 1 through 16.

FINED $5,000.00 on each of counts 17 through 81 each to run concurrent to each other. Fine is to be a committed fine. Total fine $5,000.00.

SPECIAL CONDITIONS OF PROBATION

Defendant is to voluntarily surrender to the institution designated by the Bureau of prisons on a day no later than 7/30/85 at 12 noon. If no prison is designated by 7/30/85 defendant is to voluntarily surrender to the U.S. Marshal at Foley Square on 7/30/85 at 10 a.m.

Bail continued as presently set.

ADDITONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant serve his sentence at the satellite camp at Danbury or Allenwood.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY OF

THIS DATE 7/9/85

By [illegible]
DEPUTY

SIGNED BY
U.S. District Judge

/s/ LEE P. GAGLIARDI
LEE P. GAGLIARDI
Date 7/9/85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ.

UNITED STATES OF AMERICA, PLAINTIFF

v.

IRWIN HALPER AND MORRIS HALPER, DEFENDANTS

COMPLAINT

[Filed Apr. 11, 1986]

Plaintiff United States of America, by its attorney Rudolph W. Giuliani, United States Attorney for the Southern District of New York, for its complaint, alleges the following upon information and belief:

1. This is an action for damages and penalties under the False Claims Act, 31 U.S.C. §§ 3729-3731, and principles of common law.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1345 and 31 U.S.C. § 3730(a).

3. Venue is proper in this District purusant to 28 U.S.C. § 1391(b) in that the claims arose in this District.

THE PARTIES

4. Plaintiff is the United States of America. The United States Department of Health and Human Services ("HHS") is an agency of the United States and has principal responsibility for administering the Social Security Act. Blue Cross and Blue Shield, Inc. of Greater New York ("Blue Cross") acts as a fiscal intermediary pursuant

to contract with HHS and administers the Medicare Program described below. Its offices are located at 622 Third Avenue, New York, New York.

5. Defendant Irwin Halper was at all relevant times a resident of the State of New York. He is not a member of an armed force of the United States.

6. Defendant Morris Halper is and was at all relevant times a physician licensed to practice medicine in the State of New York. He is not a member of an armed force of the United States.

DEFENDANTS' SCHEME TO DEFRAUD

7. The Medicare Program was created by Congress in 1965 under Title XVIII of the Social Security Act. The program provides for basic insurance coverage of in-hospital and out-patient medical services for individuals age 65 and over and certain other persons entitled to Social Security benefits because of disability.

8. Providers of Medicare services under the Supplementary medical insurance benefits program ("Medicare, Part B") file claims for Part B services on standardized Medicare claim forms, on which certain information about the provider, the patient, and the nature of the medical services performed is to be provided. Each such claim form is processed by Blue Cross as the Medicare fiscal intermediary for HHS, and Blue Cross issues a check directly to the provider for the amount of any approved claim. This has been the procedure since at least January 1982.

9. As part of the description of the medical services performed, the provider was instructed to include on the claim forms the Medicare billing procedure code that corresponded to each medical service. The Medicare procedure code was found in manuals made available to each

provider by Blue Cross, listing the procedure code corresponding to each type of medical service and the cost Medicare would pay to providers for that service.

10. In addition to the procedure codes corresponding to each particular medical service, the manuals also specified two procedure codes to be included on Medicare claim forms so that providers could receive additional reimbursement for performing a medical service when they had to travel to a private home, a nursing home or a Skilled Nursing Facility ("NH") to perform that service. The "9018" procedure code was the proper code for seeking reimbursement for services performed on the *first* or *only* patient seen at a private home, a nursing home or a Skilled Nursing Facility. The "9019" procedurce code was the proper code for seeking reimbursement for services performed on each *subsequent* patient seen on the same day at the same facility. According to the manuals, at all relevant times, the reimbursement allowed by Medicare for services billed under the "9018" code was either $10.00 or $12.00, and the reimbursement allowed by Medicare for services billed under the "9019" code was $3.00.

11. Defendant Irwin Halper was at all relevant times the manager of the New City Medical Laboratories, Inc. ("NCML"), 345 North Main Street, New City, New York 10956, whose employees provided medical services to patients at, *inter alia,* the following two facilities pursuant to contracts between NCML and those two facilities: Friedwald House, New Hempstead Road, New City, New York and Riverside Nursing Home, Route 9W, Haverstraw, New York. Defendant Morris Halper was at all relevant times the director of NCML.

12. From in or about January 1982 until in or about December 1983, defendants knowingly made or caused to be made to the United States, through its fiscal intermediary Blue Cross, certain false and fraudulent claims

for Medicare claims by submitting claim forms that falsely and fraudulently characterized certain services performed by NCML as services reimbursable under the higher-priced "9018" procedure code when in truth and in fact, as defendants then well knew, the services were not reimbursable under the "9018" code but were reimbursable only under the "9019" code because the services were performed not on the first or only patient but on subsequent patients at a particular NH facility on a particular day. At least 65 such false and fraudulent claims were submitted by defendants, and these claims are identified and listed in the schedule annexed hereto, and incorporated herein, as Exhibit A.

13. The Medicare claim forms submitted by defendants were accompanied by certifications by defendant Morris Halper that certain medical services had been rendered at certain times and places in a certain manner when in fact, as defendants then well knew, those procedures and services had not been performed as certified.

14. The United States and Blue Cross, unaware of the foregoing circumstances and conduct of defendants, made payment on the Medicare claims listed in Exhibit A at the higher "9018" rate when the claims should have been paid at the lower "9019" rate.

COUNT I

False Claims Act

15. Plaintiff repeats and realleges the allegations of paragraphs 1 through 14 above.

16. For the purpose of obtaining payment by the United States of claims which defendants knew to be false and fraudulent, defendants knowingly made, used or caused to be made false, fictitious and fraudulent statements concerning the performance of certain medical

services on Medicare patients which they falsely claimed entitled them to reimbursement at the higher "9018" rate.

17. Plaintiff made payment on the false, fictitious and fraudulent claims submitted by defendants and as a result was damaged in an amount to be determined at trial, subject to doubling and a $2,000 forfeiture on each of at least 65 false claims.

COUNT II

Common Law Fraud

18. Plaintiff repeats and realleges the allegations of paragraphs 1 through 17 above.

19. Statements made by defendants as to the performance of certain medical services and defendants' entitlement to payment at the higher "9018" rate for the Medicare claims listed in Exhibit A hereto were misrepresentations of material fact.

20. Defendants made these representations with knowledge of their falsity or with reckless disregard for their truth.

21. Defendants made these representations intending that the United States and Blue Cross rely on them in determining whether to approve and pay the Medicare claims listed in Exhibit A.

22. The United States and Blue Cross, acting in reliance on defendants' misrepresentations, paid defendants on their fraudulent claims.

23. As a result of defendants' actions, plaintiff has been damaged in an amount to be determined at trial.

COUNT III

Unjust Enrichment

24. Plaintiff repeats and realleges the allegations of paragraphs 1 through 23 above.

25. Because of payments made to defendants on the Medicare claims listed in Exhibit A, defendants have been unjustly enriched to the detriment of the United States and the United States has been damaged in an amount to be determined at trial.

COUNT IV

Mistake of Fact

26. Plaintiff repeats and realleges the allegations of paragraphs 1 through 25 above.

27. The United States, through its fiscal intermediary Blue Cross, paid defendants on the Medicare claims listed in Exhibit A based on the erroneous belief that the representations made by defendants were true and correct and that their claims for reimbursement at the higher "9018" rate were valid and proper.

28. Plaintiff's erroneous beliefs were material to its determination to pay defendants on their Medicare claims.

29. As a result of its payments, plaintiff was damaged in an amount to be determined at trial.

WHEREFORE, plaintiff United States of America demands and prays that judgment be entered in its favor and against defendants as follows:

(a) On Count I, in the amount of double plaintiff's damages as may be determined at trial, plus $130,000 in forfeitures, together with interest, costs and attorneys' fees;

(b) On Count II, in the amount of plaintiff's damages as may be determined at trial, plus interest, costs and attorneys' fees;

(c) On Count III, in the amount of plaintiff's damages as may be determined at trial, plus interest, costs and attorneys' fees;

(d) On Count IV, in the amount of plaintiff's damages as may be determined at trial, plus interest, costs and attorneys' fees;

(e) For such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 11, 1986

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

By: /s/ AMY ROTHSTEIN
AMY ROTHSTEIN
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-1976

SCHEDULE OF CLAIMS

Count of Indictment*	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
17	1/12/82	Friedwald	Curtis	1205622763	2/16/82
18	1/12/82	"	Smith	1206729223	3/4/82
19	1/12/82	"	Hindle	1205301945	2/16/82
20	1/12/82	"	Hausner	1205301931	2/16/82
21	1/12/82	"	Hendelman	1206728688	2/16/82
22	6/2/82	Riverside	McCabe	1216926347	6/14/82
23	6/2/82	"	Paider	1216926338	6/14/82
24	6/2/82	"	Decker	1217228947	6/14/82
25	6/2/82	"	Geiger	1216926195	6/14/82
26	6/2/82	"	Hasko	1216926199	6/14/82
27	6/2/82	"	Kogan	1216926197	6/14/82
28	12/6/82	Riverside	Koepping	3300536037	12/30/82
29	12/6/82	"	Johnson	3300536034	12/30/82

United States v. *Irwin Halper*, 85 Cr. 247 (LPG).

Count of Indictment	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
30	12/6/82	Riverside	Fein	3300536036	12/30/82
31	12/6/82	"	Tracy	1301228964	1/7/83
32	12/6/82	"	Graff	3234735129	12/9/82
33	12/6/82	"	Rose	3301237116	1/7/83
34	12/6/82	"	Martinez	3234735131	12/9/82
35	12/6/82	"	LaPlace	3234735101	12/9/82
36	12/6/82	"	Yonko	3234735128	12/9/82
37	12/6/82	"	Clark	3234735100	12/9/82
38	12/14/82	Friedwald	Greenberg	3302036851	1/17/83
39	12/14/82	"	McArdle	3302036860	1/17/83
40	12/14/82	"	Klein	3302036856	1/17/83
41	12/14/82	"	LaBlang	3305333910	1/17/83
42	12/14/82	"	Schweitzer	1301705517	1/12/83
43	12/14/82	"	Feldman	3302036864	1/17/83
44	12/14/82	"	Storm	1301705518	1/12/83
45	12/14/82	"	Gottlieb	3301735187	1/12/83
46	12/14/82	"	Bernstein	3302036857	1/17/83
47	12/14/82	"	Miller	3302036859	1/17/83

EXHIBIT A

Count of Indictment	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
48	12/14/82	Friedwald	Slater	3302036858	1/17/83
49	12/14/82	"	Rones	3302036861	1/17/83
50	12/14/82	"	Hendelman	3302036855	1/17/83
51	12/14/82	"	Toffel	3301735186	1/12/83
52	12/16/82	Friedwald	Edelson	3302136157	1/18/83
53	12/16/82	"	Gladstain	3302036853	1/17/83
54	12/16/82	"	Breisacher	1302126807	1/18/83
55	12/16/82	"	Goldberger	3302136169	1/18/83
56	12/16/82	"	Hauseman	1302126799	1/18/83
57	12/16/82	"	Berel	1302126801	1/18/83
58	12/16/82	"	Eiss	3302036850	1/17/83
59	12/16/82	"	Patrick	1302126800	1/18/83
60	12/16/82	"	Habish	3302036949	1/17/83
61	12/16/82	Friedwald	Nagelberg	3302136158	1/18/83
62	12/16/82	"	Bernstein	3302136168	1/18/83
63	12/16/82	"	Lipschitz	3302136163	1/18/83
64	12/16/82	"	Leon	3302136160	1/18/83

Count of Indictment	Date of Services	Place of Services	Patient	Medicare Claim Number	Approximate Date Claim Submitted
65	12/16/82	Friedwald	Mead	3302036852	1/17/83
66	12/16/82	"	Hindle	3302136170	1/18/83
67	12/16/82	"	Pfarrer	3302136164	1/18/83
68	12/16/82	"	Mayer	3302136156	1/18/83
69	12/16/82	"	Hausner	3302136167	1/18/83
70	12/16/82	"	Dorrien	1302126806	1/18/83
71	12/16/82	"	Adler	3302136159	1/18/83
72	12/16/82	"	Toffel	3302136166	1/18/83
73	12/28/83	Riverside	Glassing	8336420570	12/28/83
74	12/28/83	"	Decker	8336420576	12/28/83
75	12/28/83	"	Geiger	8336420847	12/28/83
76	12/28/83	"	Merlmelste	8336420572	12/28/83
77	12/28/83	"	Martin	8336420845	12/28/83
78	12/28/83	"	Gannon	8336420516	12/28/83
79	12/28/83	"	Villa	8336420571	12/28/83
80	12/28/83	"	Lynch	8336420569	12/28/83
81	12/28/83	"	Kerr	8336420568	12/28/83

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION 86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA, PLAINTIFF

against

IRWIN HALPER AND MORRIS HALPER, DEFENDANTS

ANSWER

[Filed May 8, 1986]

Defendant, Irwin Halper, as and for an answer to this plaintiff's complaint alleges pro se as follows:

1. Denies each and every allegation contained in paragraphs "12", "13", "16", "17", "20", "21", "22", "23", "29".

2. Denies knowledge or information sufficient to form a belief as to paragraphs "6", "8", "9", "10", "14", "19", "25", "27", "28".

3. Repeats denial of each and every allegation as set forth above and repeated in paragraphs "15", "18", "24", "26".

WHEREFORE, defendant Irwin Halper demands that each count of plaintiff's complaint be dismissed and the defendant be awarded the costs of this action and such

other and further relief as this Court deems just and proper.

April 27, 1986

/s/ IRWIN HALPER
Irwin Halper
pro se

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION NO. 86-CIV2955

UNITED STATES OF AMERICA, PLAINTIFF

vs.

IRWIN HALPER AND MORRIS HALPER, M.D.
DEFENDANT-THIRD PARTY PLAINTIFF

vs.

ROBERT HALPER, THIRD PARTY DEFENDANT

HON. ROBERT SWEET

[Filed June 11, 1986]

THIRD PARTY COMPLAINT

Defendant-Third Party Plaintiff, Morris Halper, residing at 41-38 Erli Road, Fair Lawn, New Jersey, complaining of defendant says:

1. Plaintiff United States of America has filed against Morris Halper a Complaint, a copy of which is annexed as Exhibit "A".

2. Third Party defendant Robert Halper resides at 6 Sterling Road, Armonk, New York.

3. From 1980 to 1984, Defendant-Third Party Plaintiff, Morris Halper held the nominal title of Medical Director of New City Medical Laboratories, Inc. (hereinafter "NCML").

4. At all relevant times Third Party Defendant Robert Halper was an officer, stockholder and employee of NCML.

5. At all relevant times Third Party Defendant Robert Halper participated in the usual daily business of NCML, including billing.

6. Unbeknownst to Defendant-Third Party Plaintiff, Morris Halper, Third Party Defendant Robert Halper submitted false, fictitious and fraudulent billing statements to plaintiff and to Blue Cross.

7. Third Party Defendant also forged the name of Defendant-Third Party Plaintiff, Morris Halper on billing statements submitted by NCML to Plaintiff and to Blue Cross.

WHEREFORE, Defendant-Third Party Plaintiff, Morris Halper demands judgment against Third Party Defendant Robert Halper for indemnification and contribution in the event judgment is entered against Morris Halper, plus counsel fees, costs of suit and damages suffered.

JURY DEMAND

Third Party Plaintiff demands a trial by jury on all issues.

KUTTNER, TONER &
DiBENEDETTO

BY: /s/ DANIEL J. DiBENEDETTO
3 Becker Farm Road
Roseland, New Jersey 07068
(201) 994-1600
Attorneys for Defendant/
Third Party Plaintiff
Morris Halper

Dated: JUNE 10, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2955 (RWS)

UNITED STATES OF AMERICA, PLAINTIFF

v.

IRWIN HALPER AND MORRIS HALPER, DEFENDANTS

STIPULATION AND ORDER OF DISMISSAL AS TO DEFENDANT MORRIS HALPER

[Filed Oct. 17, 1986]

IT IS HEREBY STIPULATED AND ARGEED by and between the parties to the above action that the action shall be dismissed as against defendant Morris Halper, purusant to Fed. R. Civ. P. 41(a)(1).

Dated: New York, New York
October 8, 1986

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for United States
of America

By: /s/ AMY ROTHSTEIN
AMY ROTHSTEIN
Assistant United States Attorney
One St. Andrew's Plaza
New York, New York 10007
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KUTTNER, TONER &
DiBENEDETTO
Attorneys for Defendant
Morris Halper

BY: /s/ DANIEL J. DiBENEDETTO
DANIEL J. DiBENEDETTO
3 Becker Farm Road
P.O. Box 26
Roseland, New Jersey 07068
(201) 994-1600

/s/ IRWIN HALPER
IRWIN HALPER
Defendant Pro Se
6 Sterling Road
Armonk, New York 10504

SO ORDERED: 10/15/86

/s/ SWEET
United States District Judge

Supreme Court of the United States

No. 87-1383

UNITED STATES, APPELLANT

v.

IRWIN HALPER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

June 13, 1988.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60818

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

Appeal From The United States District Court
For The Southern District of New York

MOTION TO DISMISS
JURISDICTIONAL STATEMENT

IRWIN HALPER
PRO SE

6 STERLING ROAD
ARMONK, N.Y. 10504
914-273-9848

#490

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

NO. 87-1383

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

RESPONSE MOTION TO DISMISS REVIEW OF JURISDICTIONAL STATEMENT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS

OPINION BELOW

I, Irwin Halper, pro se residing at 6 Sterling Road, Armonk, N.Y., 10504 do reply to the Jurisdictional Statement in the above case, filed in this Court to review an order of the U.S. District for the Southern District of New York (No 86 Civ. 2955)Dated April 24,1987 by filing this response as my motion to dismiss, according to Rule 16 of your Court.

REASON

Since my punishment has compensated the U.S. District for the Southern District of New York No.86 Civ.2955) for the crime I committed and the costs incurred by the Court, it would be unconstitutional to punish me twice as prohibited by the Double Jeopardy Clause. The question pertaining to Double Jeopardy on page one of the Jurisdictional Statement has been

fairly answered in the Amended Judgement of of Justice S.W.Sweet. A review of the Statement is unnecessary.

CONCLUSION

I respectfully make a MOTION to the Supreme Court of the United States to begin studying the response I am filing and accept it in the FORM OF A MOTION TO DISMISS REVIEW OF THE JURISDICTIONAL STATEMENT.

Jurisdictional Statement should not be noted and review of it denied and dismissed.

Respectfully submitted.

IRWIN HALPER, Pro se
6 Sterling Rd.
Armonk,N.Y.10504

cc: The Hon. Charles Fried
Solicitor General of the U.S.
Department of Justice
Washington, D.C. 20530

(4)

No. 87-1383

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROY T. ENGLERT, JR.
Assistant to the Solicitor General
MICHAEL JAY SINGER
THOMAS M. BONDY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the $2000-per-false-claim penalty prescribed by the civil False Claims Act, 31 U.S.C. (1982 ed.) 3729-3731, when applied to a defendant who has already been convicted and punished under the criminal false claims statute (18 U.S.C. 287) for 65 false claims of $9 each, is in effect a criminal penalty prohibited by the Double Jeopardy Clause.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Morris Halper, M.D., was named as a defendant in the government's complaint in the district court, but the complaint was dismissed as against him pursuant to a stipulation. Before the complaint was dismissed as against him, Morris Halper filed a third-party complaint against Robert Halper.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1383

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court declaring the statute unconstitutional as applied (J.S. App. 1a-5a) is reported at 664 F. Supp. 852. A prior, superseded opinion of the district court (J.S. App. 6a-11a) is reported at 660 F. Supp. 531.

JURISDICTION

The judgment of the district court (J.S. App. 12a) was filed on October 21, 1987.[1] A notice of appeal to this

[1] Although the district court issued a later judgment on October 28, 1987, it is the October 21 judgment that constitutes the court's final judgment for purposes of appealing the constitutional holding below. See J.S. 1 n.1; see also *Buchanan* v. *Stanships, Inc.*, No. 87-133 (Mar. 21, 1988).

Court (J.S. App. 13a-14a) was filed on November 19, 1987. On January 13, 1988, Justice Marshall extended the time within which to docket this appeal to and including February 17, 1988. The appeal was docketed on that date, and probable jurisdiction was noted on June 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

31 U.S.C. 3729, before its amendment in 1986, provided in pertinent part:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person and costs of the civil action, if the person—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved; [or]

[2] See J.S. 2 n.2. Although Section 1252 was repealed by Pub. L. No. 100-352, § 1, 102 Stat. 662, which was signed by the President on June 27, 1988, the repeal does not take effect until September 25, 1988 (§ 7, 102 Stat. 664), and "shall not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*).

> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *.

31 U.S.C. (Supp. IV) 3729 provides in pertinent part:

> (a) * * * Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * *.
>
> * * * * *
>
> * * * A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

STATEMENT

1. The civil False Claims Act, 31 U.S.C. 3729-3731, was first enacted in 1863 and signed into law by President Lincoln in an effort to "stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War." *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976); see S. Rep. 99-345, 99th

Cong., 2d Sess. 8 (1986).[3] It is "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, *supra*, at 2; see H.R. Rep. 99-660, 99th Cong., 2d Sess. 18 (1986)). "[T]his statute has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4).

In pertinent part, the statute gives the United States (31 U.S.C. 3730(a)) a civil cause of action against defined classes of persons who seek the payment of false claims by the federal government (see 31 U.S.C. 3729). The version of the statute that was in effect at the time of the false claims in this case provides that, if a defendant is determined to have committed a false claim violation within the meaning of the Act, the government is entitled to recover a civil penalty of $2000 plus double damages and costs. 31 U.S.C. 3729. The $2000-per-claim penalty remained in the statute, unchanged, from 1863 to 1986 (H.R. Rep. 99 660, *supra*, at 17).[4]

---

[3] The original False Claims Act, including both criminal and civil provisions, was the Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. It was reenacted as Rev. Stat. §§ 3490-3494, 5438 (1875 ed.). Before 1982, the part of the Act dealing with civil penalties was codified in 31 U.S.C. (1970 ed.) 231 *et seq.*, but the official text of the statute was that which appeared in the Revised Statutes. *Bornstein*, 423 U.S. at 305 n.1. The civil penalties were revised without substantive change, recodified in 31 U.S.C. 3729-3731, and enacted into positive law by the Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 978-979. Those provisions were amended in 1986 (see note 4, *infra*). The criminal provisions of the False Claims Act, as amended, are codified in 18 U.S.C. (& Supp. IV) 287 and 1001. See *Bornstein*, 423 U.S. at 307 n.1.

[4] On October 27, 1986, the President signed into law the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986 Amendments). The 1986 Amendments revise the civil False Claims Act to provide in most instances for a civil penalty of from $5000 to $10,000 plus triple damages and costs. See 31 U.S.C. (Supp. IV) 3729(a). It is the position of the United States that (with limited exceptions) the 1986 Amendments are applicable to all cases pending on their effective date, including cases in which the false claims were made earlier. See *United States* v. *Ettrick Wood Products, Inc.*, 683 F. Supp. 1262, 1264-1268 (W.D. Wis. 1988); *Gravitt* v. *General Electric Co.*, 680 F. Supp. 1162, 1163 (S.D. Ohio 1988), appeal dismissed, No. 88-3171 (6th Cir. May 3, 1988), petition for cert. pending, No. 88-182; *United States* v. *Hill*, 676 F. Supp. 1158, 1165-1172 (N.D. Fla. 1987). But see *United States* v. *Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987). The government did not assert a demand for civil penalties under the amended version of the statute in the present case, however, and accordingly the only question before this Court concerns the constitutionality of the pre-1986 version of the statute.

2. Appellee was the manager of New City Medical Laboratories, Inc. (New City), which provided medical services for patients eligible for benefits under the federal Medicare program (J.S. App. 6a). Providers under that program are entitled to federal reimbursement, at specified rates, for services rendered to Medicare recipients. From about January 1982 to December 1983, appellee submitted 65 different false claims for reimbursement to Blue Cross and Blue Shield of Greater New York (Blue Cross), a fiscal intermediary of the Department of Health and Human Services, which administers the Medicare program (*id.* at 7a).[5] Each of appellee's 65 claims demanded payment of $12 by falsely representing the nature of the service performed; in fact, the service actually performed entitled appellee to reimbursement of only three dollars (*id.* at 7a-8a). Blue Cross was unaware of the

---

[5] As the district court noted (J.S. App. 8a), the fact that appellee submitted the false claims to an intermediary rather than directly to the government does not in any way shield him from liability under either the civil or the criminal false claims statute. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541-545 (1943); see also *Bornstein*, 423 U.S. at 309; *Tanner* v. *United States*, No. 86-177 (June 22, 1987), slip op. 21. Congress has now codified this rule. See 31 U.S.C. (Supp. IV) 3729(c); see also S. Rep. 99-345, *supra*, at 21.

misrepresentations, and it paid New City the full amount that it requested (*ibid.*). New City was thus overpaid by a total of $585, an amount ultimately paid by the government.

When the government became aware of his fraud, appellee was indicted (J.A. 7-17) on 65 counts under the criminal false claims statute (18 U.S.C. (1982 ed.) 287), which makes it a crime to "make[] or present[] * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."[6] On July 9, 1985, appellee was convicted on all 65 counts as well as 16 counts of mail fraud. He was fined $5000 and sentenced to two years' imprisonment. J.A. 18-20.

3. On April 11, 1986, the goverment commenced this civil action against appellee under the civil False Claims Act, 31 U.S.C. 3729-3731 (J.A. 21-27). At the time the action was instituted, that Act provided in pertinent part that a person who "knowingly presents, or causes to be presented [to the government] a false or fraudulent claim for payment or approval," or who "knowingly makes * * * a false * * * statement to get a false or fraudulent claim paid or approved," "is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains * * * and costs of the civil action" (31 U.S.C. 3729(1) and (2)). Because the statute provided for a civil penalty of $2000, the government sought a total civil penalty of

[6] Appellee was charged, tried, and sentenced under the pre-1986 version of this statute. Section 7 of the 1986 Amendments, 100 Stat. 3169, revised the wording of this statute but did not change the substance of the offense. See 18 U.S.C. (Supp. IV) 287.

$130,000, *i.e.*, $2000 for each of appellee's 65 violations.[7] The government also sought double damages ($1170) and costs.

In an initial opinion filed on April 24, 1987, the district court granted summary judgment for the government on the question of appellee's liability (J.S. App. 6a). Noting that appellee's conviction under the criminal false claims statute "necessarily determined" (*id.* at 8a) that he knowingly submitted false claims, the court ruled that appellee was collaterally estopped from denying liability in this civil action. *Id.* at 9a (citing *United States* v. *Thomas*, 709 F.2d 968, 972 (5th Cir. 1983); *Berdick* v. *United States*, 612 F.2d 533, 537 (Ct. Cl. 1979); *Sell* v. *United States*, 336 F.2d 467, 474-475 (10th Cir. 1964)).[8]

The court, however, declined to impose the civil penalty of $130,000 that the government had requested. Stating that "the amount by which the 65 claims were inflated was $9.00 for each claim, or [a total of] $585" (J.S. App. 10a), the court declared that "the total amount necessary to make the Government whole bears no rational relation to the $130,000 penalty the Government seeks" (*ibid.*). The court regarded a civil penalty of $130,000 as disproportionate to appellee's total overbillings, and it suggested that such a penalty would constitute, in effect, a "criminal" punishment (*id.* at 9a, 10a). Because appellee

[7] This Court has indicated that, when a defendant submits several fraudulent demands for payment, in general each individual false payment demand gives rise to a separate false claim violation for purposes of the False Claims Act. *Bornstein*, 423 U.S. at 309 n.4; see *United States* v. *Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988) ("each separate fraudulent submission by a defendant demanding payment from the government is a 'claim' "). See also S. Rep. 99-345, *supra*, at 8, 9; H.R. Rep. 99-660, *supra*, at 21.

[8] Accord, *e.g.*, *Killough*, 848 F.2d at 1528. The new, amended version of the statute contains an explicit collateral estoppel provision. See 31 U.S.C. (Supp. IV) 3731(d).

had already been criminally convicted and sentenced for his commission of the acts on which this civil action is based, the court stated that appellee "would have a valid double jeopardy defense" (*id.* at 10a) if a penalty of $130,000 were imposed in this case.

Apparently because of its double jeopardy concerns, the court construed the statute to mean that "the imposition of a civil penalty of $2,000 for each false claim [is not] mandatory" (J.S. App. 10a). The court then determined that a "civil penalty of $2,000 on 8 of the 65 claims, or $16,000, will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action" (*ibid.*). Accordingly, the court imposed on appellee a $16,000 civil penalty (*id.* at 11a).

4. The government moved for reconsideration of the district court's decision pursuant to Fed. R. Civ. P. 59(e). The government argued that it was well established that the statute requires a separate civil penalty of $2000 for each false claim and that the court therefore lacked the discretion to award a penalty of less than $130,000 in this case. The court thereupon issued a new opinion and judgment (J.S. App. 1a-5a, 12a), agreeing with the government's statutory interpretation but holding the statute unconstitutional as applied.

The court acknowledged that it had erred in interpreting the statute to allow less than a total civil penalty of $2000 for each statutory infraction (J.S. App. 2a). The court therefore revisited the double jeopardy concerns expressed in its previous opinion. It recognized (J.S. App. 3a-4a, 9a) that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), this Court had held that the False Claims Act's $2000 penalty provision was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause. The court nevertheless found this case distinguishable on its facts from *Hess*, because "[t]he penalty imposed in

Hess was approximately equal to the actual loss sustained by the government" (J.S. App. 4a). Focusing on a perceived "tremendous disparity between actual damage and the 'civil penalty' in this case" (*ibid.*), the court repeated its earlier statement that a penalty of $130,000 in this case would "bear[] no rational relation to the Government's loss" (*id.* at 5a). The court concluded (*ibid.*):

> [T]he $130,000 penalty sought in this case amounts to a criminal penalty for violations for which Halper has already been punished.
>
> Judgment in this amount would violate the Double Jeopardy Clause. The statute, therefore, is unconstitutional as applied to Halper, and the sought-after relief of $130,000 must be denied.

The court limited the government's recovery to double damages ($1170) and costs, with no civil penalty at all (J.S. App. 5a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court in this case has struck down as unconstitutional the statute that "has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4). The district court's holding—that the False Claims Act's civil penalty provision is really a "criminal" penalty provision in the circumstances of this case and therefore violates the Double Jeopardy Clause—is at odds with *United States ex rel. Marcus* v. *Hess*, *supra*, and *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), in which this Court rejected the double jeopardy analysis that the district court adopted here.

The error in the district court's decision is not limited to its inconsistency with this Court's decisions in *Hess* and *Rex Trailer*. The district court's ruling also disregards

Congress's clearly expressed intention that the False Claims Act's "civil penalt[ies]" (31 U.S.C. 3729) are indeed civil, not criminal, for double jeopardy and other purposes. Congress labeled the civil penalties "civil"—both in the pre-1986 version of the statute and in the 1986 Amendments—and the district court erred in upsetting Congress's characterization. The district court's view that the civil penalty in this case is disproportionately harsh also cannot be squared with Congress's determination that even more severe penalties are appropriate.

Finally, the theory embraced by the district court, because it characterizes the False Claims Act's civil penalties as "civil" or "criminal" on a case-by-case basis depending on whether (in the court's view) the penalty is proportionate to the magnitude of the defendant's fraud, would be largely standardless in its application and, if adopted, would lack any semblance of certainty and predictability. If followed, therefore, the district court's view would threaten serious disruption of the False Claims Act's civil enforcement scheme—a scheme that Congress has recently reinforced as "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, *supra*, at 2). The district court's amorphous, case-by-case approach to whether the statute's civil penalties are civil or criminal cannot be reconciled with Congress's admonition that "it is important that [the False Claims Act] be an effective tool" (H.R. Rep. 99-660, *supra*, at 18).

For all these reasons, the district court's decision should be reversed. Indeed, the two courts that have addressed the decision below have both concluded that it is incorrect and have declined to follow it. See *United States* v. *Killough*, 848 F.2d 1523, 1534 (11th Cir. 1988); *Scott* v. *Bowen*, 845 F.2d 856, 856 (9th Cir. 1988).

ARGUMENT

THE FALSE CLAIMS ACT'S CIVIL PENALTIES ARE CIVIL RATHER THAN CRIMINAL SANCTIONS.

A. This Court Has Already Decided That The False Claims Act's Civil Penalties Are Civil And That The Size Of The Government's Actual Loss Does Not Affect The Analysis

1. This case is controlled by *United States ex rel. Marcus* v. *Hess, supra*. In *Hess*, various electrical contractors had engaged in a collusive bidding scheme on a federally funded public works project. They were convicted under the criminal false claims statute and fined $54,000 (317 U.S. at 545). An action was then brought against the same contractors under the civil False Claims Act.[9] The complaint sought the imposition of 56 civil penalties of $2000 each, for a total civil penalty of $112,000 (317 U.S. at 540). The defendants asserted that the civil suit was barred by the Double Jeopardy Clause on the ground that imposition of a civil penalty of $112,000 over and above the previous criminal fine would constitute a second criminal punishment for the same conduct (*id.* at 548).

This Court rejected the defendants' argument. The Court began with the premise that jeopardy attaches only in a criminal proceeding (317 U.S. at 549 (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938)):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for

[9] The civil action was brought by a private party, in the government's name, pursuant to the False Claims Act's qui tam provisions (see 31 U.S.C. 3730(b)).

decision is thus whether [the statute in question] imposes a criminal sanction.

The Court then explained that, unlike the purpose of the criminal false claims statute, which is to punish wrongdoers and "to vindicate public justice" (*Hess*, 317 U.S. at 548-549), "the chief purpose of the [civil False Claims Act] was to provide for restitution to the government of money taken from it by fraud" (*id.* at 551).

The Court acknowledged that, in any particular case, the civil penalty of $2000 might exceed the amount of the fraud actually perpetrated on the government. But the Court emphasized that the statute—especially when considered in light of its criminal counterpart (see 317 U.S. at 549)—was clearly intended to provide a civil remedy, and that "[t]his remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered" (*id.* at 550). Stressing that Congress was faced with "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution" (*id.* at 552) to the government, the Court determined that "the instant proceedings are remedial and impose a civil sanction" (*id.* at 549), since "the device of double damages plus a specific sum [*i.e.*, $2000] was chosen [simply] to make sure that the government would be made completely whole" (*id.* at 551-552). The Court concluded, therefore, that there was no merit to the defendants' argument "that the $2,000 'forfeit and pay' provision is 'criminal' rather than 'civil'." (*id.* at 551).[10]

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[10] The phrase "forfeit and pay" came from the language of the version of the civil False Claims Act then in effect, 31 U.S.C. (1940 ed.) 231, which provided that anyone who submits a false claim against the government "shall forfeit and pay to the United States the sum of $2000" plus double damages and costs.

This Court's holding in *Hess* was reiterated 13 years later in *Rex Trailer Co.* v. *United States, supra.* In *Rex Trailer,* the defendant was criminally convicted of using fraud in buying surplus war assets from the government and was fined $25,000 (350 U.S. at 149).[1] After the criminal conviction, the government filed a civil action under the Surplus Property Act of 1944, 50 U.S.C. (1946 ed.) App. 1635, seeking the imposition of five civil penalties of $2000 each based on the same five acts of fraud that gave rise to the criminal proceeding. The defendant asserted that the previous criminal conviction posed a double jeopardy bar to the government's civil penalty proceeding (350 U.S. at 150).

As in *Hess,* this Court rejected the defendant's argument. "The only question for * * * decision," the Court observed, "is whether [the civil penalty provision] is civil or penal" (350 U.S. at 150). Noting that the Surplus Property Act's civil penalty provision was "virtually identical" (*id.* at 152 n.4) to the civil penalty provision in the False Claims Act that was upheld in *Hess,* the Court followed *Hess* and concluded that the $2000 civil penalty provision at issue was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause (*id.* at 152).

The defendant in *Rex Trailer* sought to bolster its argument by using the same theory that the district court employed in the present case: that the penalty was disproportionate to the government's actual loss under the circumstances of that case. Indeed, in *Rex Trailer* the defendant's fraud had not been shown to have resulted in any damages to the government (350 U.S. at 152). The Court rejected this effort to escape from *Hess.* Repeating *Hess*'s admonition that " '[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress' " (*ibid.* (quoting *Hess,* 317 U.S. at 552)), the Court explained that the $2000

civil penalty provision was essentially a "liquidated-damage" provision (350 U.S. at 151, 153). The fact that the civil penalty provision effectively served as a liquidated-damages clause, to provide a rough, across-the-board measure of the government's recovery, did not "transform[] what was clearly intended as a civil remedy into a criminal penalty" (*id.* at 154). Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972).

2. The district court's approach in this case cannot be squared with this Court's explicit rejection of the defendants' double jeopardy arguments in *Hess* and *Rex Trailer*. The district court characterized the False Claims Act's civil penalties as "criminal," but this Court made clear in *Hess*—and again in *Rex Trailer*—that the False Claims Act's civil penalties "are remedial and impose a civil sanction" (317 U.S. at 549). The lower courts have uniformly recognized that holding. See, *e.g.*, *Killough*, 848 F.2d at 1534; *Berdick* v. *United States*, 612 F.2d 533, 538 (Ct. Cl. 1979); *United States* v. *Hughes*, 585 F.2d 284, 287 (7th Cir. 1978); *United States* v. *Grannis*, 172 F.2d 507, 511 (4th Cir.) ("[i]t is clearly established that the defense of double jeopardy is not applicable in civil actions under the federal false claims statute"), cert. denied, 337 U.S. 918 (1949); *First Nat'l Bank* v. *United States*, 117 F. Supp. 486, 489 (N.D. Ala. 1953).

The district court erred in attempting to distinguish *Hess* on the basis of the perceived disproportionality of the penalty in this case. Although "[t]he penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government" (J.S. App. 4a; see *Hess*, 317 U.S. at 540), this Court's decision in *Hess* did not turn on the amount of actual damages inflicted on the government in that particular case.[11]

[11] Justice Frankfurter, in fact, approached the question from a different angle than did the Court precisely because, although the Court's analysis invoked rough notions of proportionality, the Court did not leave open the possibility of proving disproportionality in any particular case. Noting that the majority's approach turned on the distinction between "an extra penalty" and "an indemnity for loss suffered," Justice Frankfurter contended that, "[i]f that is the issue on which the protection against double jeopardy turns, • • • respondents • • • ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss" (317 U.S. at 554 (concurring opinion)). Although Justice Frankfurter agreed with the majority that such a factual inquiry was unnecessary, he felt that that result should be reached by holding that, regardless of proportionality considerations, "where two • • • proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense" (*id.* at 555).

If *Hess* was not sufficient to make clear that the Court had held the $2000-per-false-claim penalty to be a civil remedy in general, and not just in cases involving demonstrated large losses to the government, then the opinion in *Rex Trailer* cleared away any remaining doubt. The Court in *Rex Trailer* expressly rejected the defendant's double jeopardy argument in the face of a contention that the government had suffered no measurable loss at all: "there is no requirement, statutory or judicial, that specific damages be shown" (350 U.S. at 152).

As the courts have recognized in the wake of *Rex Trailer*, and as Congress has recently reaffirmed, the government is entitled under the False Claims Act to recover a full civil penalty even in cases in which *no* money is paid out and there are *no* measurable damages: "The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages." S. Rep. 99-345, *supra*, at 8; *Killough*, 848 F.2d at 1533-1534 ("[e]ven if no payment [i]s made on a claim or the government cannot prove actual damages, a

forfeiture shall be awarded on each false claim submitted"); *Hughes,* 585 F.2d at 286 n.1 ("[a] false claim is actionable under the [False Claims] Act even though the United States has suffered no measurable damages from the claim"); *Brown* v. *United States,* 524 F.2d 693, 706 (Ct. Cl. 1975) ($2000 civil penalty per false claim is "to be paid whether or not defendant can prove actual damages"); *Toepleman* v. *United States,* 263 F.2d 697, 699 (4th Cir.) ("against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable"), cert. denied, 359 U.S. 989 (1959); *United States* v. *CFW Construction Co.,* 649 F. Supp. 616, 618 (D.S.C. 1986) ("a showing of measurable damages to the United States is not an essential element of a cause of action for submission of false claims"), appeal dismissed, 819 F.2d 1139 (4th Cir. 1987).

The foregoing authorities show that the district court erred in relying on the propositions that "[a] penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss" (J.S. App. 5a) and that there are no cases "involving sums that even begin to approach the tremendous disparity between actual damage and the 'civil penalty' in this case" (*id.* at 4a). When the government obtains a $2000 civil penalty (or many such penalties) without sustaining any loss, the ratio between the penalty and the loss is far greater than the 220:1 ratio that the district court mentioned here—the ratio is infinite—yet it is established law that that ratio does not convert the civil penalty into a criminal sanction.

The district court's focus on the 220:1 ratio of civil penalty to actual loss is flawed in another respect. The district court could not have meant to suggest that a single $2000 penalty for a single $9 overcharge would be a criminal penalty. To the contrary, the court initially thought it appropriate to impose eight such penalties and

no penalties for the remaining 57 false claims (J.S. App. 10a). Yet the ratio of one $2000 penalty to one $9 overcharge, eight $2000 penalties to eight $9 overcharges, or 65 $2000 penalties to 65 $9 overcharges is exactly the same. There is no good reason why a statute should be deemed civil when applied to one fraud but criminal when applied to 65 frauds.[12]

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[12] The district court correctly determined in its second opinion that the statute required a $2000 penalty for each of the 65 false claims in this case. It is well established that "the $2,000 penalty for each false claim is mandatory" (J.S. App. 1a-2a). See, *e.g., Killough,* 848 F.2d at 1533; *United States* v. *Hughes,* 585 F.2d 284, 286 (7th Cir. 1978); *Brown* v. *United States,* 524 F.2d 693, 705-706 (Ct. Cl. 1975); *United States* v. *Cato Bros., Inc.,* 273 F.2d 153, 156 (4th Cir. 1959), cert. denied, 362 U.S. 927 (1960); *United States* v. *Diamond,* 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987); *United States* v. *Jacobson,* 467 F. Supp. 507, 508 (S.D.N.Y. 1979). See generally *United States* v. *Bornstein, supra* (reversing court of appeals decision that imposed only one $2000 forfeiture for three separately invoiced shipments of falsely marked tubes). The Senate Judiciary Committee has twice in the last eight years reconfirmed this understanding of the pre-1986 statute (S. Rep. 99-345, *supra,* at 8; S. Rep. 96-615, 96th Cong., 2d Sess. 2 (1980) (emphasis added; footnotes omitted)):

> In its present form, the False Claims Act empowers the United States to recover double damages * * *. In addition, the United States may recover one $2,000 forfeiture for each false claim submitted or for each false document submitted in support of a claim. *The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false.* The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages.

In its initial opinion, the district court ruled that, even though appellee committed 65 false claims violations, the court nevertheless possessed the discretion to impose a total civil penalty in an amount less than $130,000 (J.S. App. 10a). The court relied on *Peterson* v. *Weinberger,* 508 F.2d 45, 55 (5th Cir.), cert. denied, 423 U.S. 830 (1975), and *United States* v. *Greenberg,* 237 F. Supp. 439, 445

The reason why large (even infinite) ratios of penalty to loss in particular cases do not suffice to render the statute criminal is that the statute is designed to recoup various indirect as well as direct costs that the government suffers and to do so by means of a formula rather than by case-specific inquiry. The False Claims Act's "[f]orfeitures and double damages recompense the government for costs of the investigation and litigation as well as the actual monetary damage incurred because of the defendant's fraud" (*Killough*, 848 F.2d at 1534); in fact, the district court itself seems to have acknowledged this point.[13] As this Court has indicated in a related context (see *One Lot Emerald Cut Stones*, 409 U.S. at 237), even when a defendant's false claim nets him little or no gain, the defendant's fraudulent conduct imposes on the government an "extremely costly" burden of investigation and prosecution. See *Mayers* v. *Department of Health &*

(S.D.N.Y. 1965). In its amended opinion holding that the statute requires the imposition of one $2000 civil penalty for each false claim submitted, however, the court correctly noted (J.S. App. 2a) that in both *Peterson* and *Greenberg* the government consented to a cumulative civil penalty amounting to less than one $2000 penalty for each false claim violation. See *Peterson*, 508 F.2d at 55; *Greenberg*, 237 F. Supp. at 445. For that reason, *Peterson* and *Greenberg* are distinguishable. See also *Killough*, 848 F.2d at 1533 (distinguishing *Peterson*); *Diamond*, 657 F. Supp. at 1206 (distinguishing both *Peterson* and *Greenberg*). In our view, *Peterson* and *Greenberg*, to the extent that they suggest the existence of discretion in the courts to impose less than a full $2000-per-claim penalty when the government seeks that full penalty, are also wrong.

[13] The district court recognized in its opinion (J.S. App. 10a) that the civil remedy designed by Congress "must take into account the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages."

Human Services, 806 F.2d 995, 999 (11th Cir. 1986) (upholding administrative imposition of civil penalty of almost two million dollars in Medicare fraud case brought under the Civil Monetary Penalties Act), cert. denied, No. 86-1887 (Oct. 5, 1987). Thus, the district court erred in dwelling on the government's "actual damage" (J.S. App. 4a), because, "to the Government a false claim, successful or not, is always costly" (*Toepleman*, 263 F.2d at 699). Cf. *Rex Trailer*, 350 U.S. at 153.

A civil penalty of $2000 for a false claim against the government is manifestly reasonable and is well within Congress's legislative power. See *Toepleman*, 263 F.2d at 699 ("[f]or a single false claim $2000 [in 1959 dollars] would not seem exorbitant"); cf. *Hess*, 317 U.S. at 552 (stressing "the inherent difficulty of choosing a proper specific sum which would give full restitution"). This is especially so because that sum was chosen by Congress in 1863 and upheld by this Court in 1943 (*Hess*) and 1956 (*Rex Trailer*)—years when $2000 was a much more princely sum than it is today. See H.R. Rep. 99-660, *supra*, at 17; S. Rep. 96-615, *supra*, at 7 n.11. Moreover, a civil penalty of $2000 serves not only "to make sure that the government would be made completely whole" (*Hess*, 317 U.S. at 551-552) for its losses, but also the additional and wholly legitimate purpose of deterring those who would submit false claims to the government.[14] As this Court wrote in *Hess*, 317 U.S. at 550-551 (citations and footnote omitted):

> Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages

[14] Cf. H.R. Rep. 99-660, *supra*, at 18 (explaining that one purpose of the 1986 Amendments to the False Claims Act was to bolster the statute's deterrent effect).

> . . . sustained and the cost of suit, including a reasonable attorney's fee." Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. The law can provide the same measure of damage for the government as it can for an individual.

See also *Toepleman*, 263 F.2d at 699 ("[w]ithout converting it into a criminal penalty, a statutory forfeiture of money has always been demandable of a wrongdoer by civil process though its purpose and effect be punishment"); *Chapman* v. *United States*, 821 F.2d 523, 528 (10th Cir. 1987). Imposition of a $2000 penalty for each false claim is especially appropriate in the present case given the endemic abuse that plagues government programs such as Medicare (see, *e.g.*, S. Rep. 99-345, *supra*, at 2-4, 21).

In short, the civil penalty in this case is substantial not because Congress has provided for an excessive sanction, but, quite simply, because the defendant has defrauded the government 65 times. "While the total damage award in this action may appear to be excessive, it reaches such proportions for the sole reason that [the defendant] has been found to have submitted [a great many] separate false claims." *United States ex rel. Fahner* v. *Alaska*,

591 F. Supp. 794, 801-802 (N.D. Ill. 1984) (imposing civil penalty in excess of one million dollars for defendant's commission of more than 500 False Claims Act violations). Contrary to the district court's apparent belief, the government's civil remedy is not transformed into a criminal punishment just because appellee cheated the government many times. See *Mayers*, 806 F.2d at 998-999 ($1,791,000 civil penalty for 2702 false claims held not criminal); *Berdick*, 612 F.2d at 538 & n.15 (civil penalty of $72,000 for 36 false claims and total damages of $1545.75); *United States* v. *Diamond*, 657 F. Supp. 1204, 1205-1206 (S.D.N.Y. 1987) (civil penalty of $78,000 for 39 false claims and total fraud of $549.04).

B. Congress's Own Statements Show That The Penalties In The Civil False Claims Act Are Civil

Even if this Court had not already resolved the very question presented in this case, it would be clear that the penalties required by the civil False Claims Act are civil. For "[t]his Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States* v. *Ward*, 448 U.S. 242, 248 (1980) (citing *One Lot Emerald Cut Stones*, 409 U.S. at 237; *Helvering* v. *Mitchell*, 303 U.S. at 399). It is not difficult to conclude as a matter of statutory construction that a "civil penalty" statute (31 U.S.C. 3729) is indeed civil. And Congress's recent amendment of the statute buttresses that conclusion in two respects. First, Congress has now raised the civil penalty from $2000 per false claim to "not less than $5,000 and not more than $10,000" per false claim (31 U.S.C. (Supp. IV) 3729(a)). Congress's substantial increase of the statutory penalty weighs against the district court's suggestion that imposition of the preexisting $2000 penalty is so

excessive that it has been shown by "the clearest proof" (*Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), *quoted in Ward*, 448 U.S. at 249) to be criminal rather than civil. Second, in amending the False Claims Act, Congress explicitly reaffirmed that the "civil penalty" provision is intended to be a civil sanction.

1. Congress's own characterization of the civil penalties as "civil" is highly probative. This Court has made clear that when "Congress has indicated an intention to establish a civil penalty" (*United States* v. *Ward*, 448 U.S. at 248) as opposed to a criminal punishment, Congress's intention is entitled to great weight and is controlling unless "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention" (*id.* at 248-249). This Court has admonished, moreover, that "[i]n regard to this latter inquiry, • • • 'only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [it is really a criminal and not a civil provision]' " (*id.* at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. at 617)). Thus, when it is asserted that a statute that Congress has clearly denoted as civil is in reality a criminal statute for one purpose or another, the question is "whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty' " (*Ward*, 448 U.S. at 249 (quoting *Rex Trailer*, 350 U.S. at 154)). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984) (holding forfeiture proceeding under 18 U.S.C. 924(d) "civil" and rejecting double jeopardy claim); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-237 (1972) (holding forfeiture proceeding under 19 U.S.C. 1497 "civil" and rejecting double jeopardy claim); *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding

Civil Monetary Penalties Law, 42 U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim).

There is no basis in this case for countering the presumption that a statute ordinarily is deemed civil if Congress says it is. Indeed, as this Court indicated in *Hess* (see 317 U.S. at 549), the presumption in this case is particularly strong, not only because Congress has expressly mandated "civil penalties" to be enforced by a "civil action" (31 U.S.C. 3729, 3730(a); see 31 U.S.C. (Supp. IV) 3729(a), 3730(a)), but also because Congress has deliberately provided for a separate criminal analog to the False Claims Act, in 18 U.S.C. 287. "Congress labeled the sanction • • • a 'civil penalty,' a label that takes on added significance given its juxtaposition with the criminal penalties set forth in [another, separate statutory provision]" (*Ward*, 448 U.S. at 249). As this Court stressed in *Hess* (317 U.S. at 549), "[t]he statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy," and "[t]he fact that the [statutory scheme] contains two separate and distinct provisions imposing sanctions [one civil and one criminal], and that these appear in different parts of the statute, helps to make clear the [civil] character of that here invoked" (*Helvering* v. *Mitchell*, 303 U.S. at 404 (footnote omitted)). Since Congress not only has designated the sanctions as "civil" but in addition has specifically set forth an additional, criminal sanction in another, separate statute, the district court erred in "frustrating [Congress's] design" (*One Lot Emerald Cut Stones*, 409 U.S. at 237) by effectively overturning "the congressional classification of the penalty • • • as civil" (*Ward*, 448 U.S. at 250-251). See *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974) (Friendly, J.) ("When Congress has characterized the remedy as civil and the only consequence of a

judgment for the Government is a money penalty, the courts have taken Congress at its word.").[15]

2. Prompted by extensive findings that fraud "permeates generally all Government programs" (S. Rep. 99-345, *supra*, at 2)—including health-care benefit programs (*id.* at 4) such as the Medicare program involved in this case (*id.* at 21)—Congress in 1986 revised the False Claims Act "[i]n order to make the statute a more useful tool against fraud in modern times" (*id.* at 2). Congress determined that "[t]his growing pervasiveness of fraud necessitates modernization of" the Act (S. Rep. 99-345, *supra*, at 2) because "some of the provisions of the Act are outdated" (H.R. Rep. 99-660, *supra*, at 17). In particular (*ibid.*),

> the current law permits the United States to recover double damages plus $2,000 for each false or fraudulent claim. This penalty has not been changed since 1863. The Congressional Research Service has reported that, based on the Consumer Price Index, the buying power of $2,000 in 1863 would be close to $18,000, today.

Thus, emphasizing that it shared "the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments" (S. Rep. 99-345, *supra*, at 17), Congress decided to strengthen the civil penalties that the government is entitled to recover from those who "plunder[] * * * the public treasury" (*United States* v. *McNinch*, 356 U.S. 595, 599 (1958) (footnote omitted)) by making false claims.

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[15] Cf. *Mayers*, 806 F.2d at 998 ("[t]he labelling of the sanction as a 'civil penalty' is determinative of Congressional intent. This is particularly true in light of the name given by Congress to the act—the *Civil* Monetary Penalties & Assessment Act.") (emphasis in original).

The amended version of the statute increased the civil penalty per false claim from $2000 to any amount in the $5000-to-$10,000 range and imposed triple rather than double damages. The legislative history of the amendment makes it clear that Congress strengthened the government's civil remedies because it determined that more severe sanctions were needed in order to stem the tide of rampant fraud inflicted on the government. See H.R. Rep. 99-660, *supra*, at 18 (estimating government's loss to fraud at "hundreds of millions of dollars to more than $50 billion per year"); S. Rep. 99-345, *supra*, at 3 (suggesting larger estimates and noting that "[t]he cost of fraud cannot always be measured in dollars and cents, however").

Given Congress's substantial increase of the amount of the statutory civil penalty, coupled with the legislative determination that the increased amount was necessary to provide the government with an adequate weapon against the "pervasive" fraud in government programs (S. Rep. 99-345, *supra*, at 3), the district court erred by substituting its judgment for that of Congress as to the excessiveness of the smaller, $2000 civil penalties sought in this case. It bears emphasis that, in raising the civil penalty from $2000 per false claim to $5000 to $10,000 per false claim, Congress was aware that the civil penalty would be substantial in cases in which the defendant commits many violations. The Senate report speaks to this very situation (S. Rep. 99-345, *supra*, at 9):

> Each separate * * * "false payment demand" constitutes a separate claim for which a forfeiture shall be imposed * * *, and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable

> for a forfeiture for each such form that contains false entries even though several such forms may be submitted to the fiscal intermediary at one time.

See also H.R. Rep. 99-660, *supra,* at 21. The $2000 civil penalties sought against appellee cannot be viewed as excessive in light of Congress's determination that an even stiffer civil penalty—$5000 to $10,000 per false claim—is appropriate.

Congress's recent amendments not only increased the amount of the civil penalty to which the government is entitled, but they also reaffirmed that the statute's civil penalties are indeed "civil." Referring to Congress's addition to the statute of a provision "to make clear that in civil fraud actions, the Government is required to prove all essential elements of the cause of action [only] by a preponderance of the evidence" (S. Rep. 99-345, *supra,* at 30-31; see 31 U.S.C. (Supp. IV) 3731(c)), the Senate Judiciary Committee emphasized that False Claims Act proceedings are civil in nature (S. Rep. 99-345, *supra,* at 31). The Senate report makes explicit Congress's repudiation of the notion that "the civil False Claims Act is penal in nature" (*ibid.*), and highlights "[t]he Supreme Court's rejection of [that] premise in [*Hess*]" (*ibid.*). Thus, the district court's conclusion that the False Claims Act is criminal in this case contradicts Congress's emphatic reaffirmation that the Act is civil.

Of course, the legislative history of the 1986 Amendments is of limited utility in ascertaining the character of the pre-1986 version of the statute. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 734 n.14 (1977). Here, however, the legislative history of the recent amendments serves only to underscore what was already explicit in the very language of the pre-1986

statute, and what this Court has already held in *Hess* and *Rex Trailer*: that the civil False Claims Act's "civil penalty" (31 U.S.C. 3729) is indeed civil and not criminal.[16]

C. The District Court Erred In Adopting A Case-By-Case Approach To Whether The False Claims Act's Civil Penalties Are Civil Or Criminal

Finally, the district court erred in adopting a case-by-case approach to whether the False Claims Act's civil penalties are civil or criminal. The district court's theory that a statute can be "civil" in some cases and "criminal" in others, depending on whether it leads (in the court's view) to a disproportionate sanction, would produce bizarre consequences. Consider, for example, two proceedings both brought under the False Claims Act, one involving a $112,000 penalty for 56 false claims costing the government $100,000 and the other involving a $130,000 penalty for 65 false claims costing the government $585. If the first proceeding is "civil" (following *Hess*) and the second is "criminal" (under the decision below), then in the second case—but not the first—the government would be required to prove its case beyond a reasonable doubt. Conversely, in the first case the defendant would be en-

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[16] Cf. S. Rep. 96-615, 96th Cong., 2d Sess. 2 (1980) ("The proposed legislation is in no sense a 'new' false claims act."). This passage refers to the proposed False Claims Act Amendments of 1980, which were not passed but which were very similar to the amendments that ultimately were enacted in 1986. See S. Rep. 99-345, *supra,* at 13 (discussing the legislation proposed in 1980). The Senate report explaining the 1986 amendments notes that although the proposed 1980 amendments were not passed by the 96th Congress, "[e]vidence of rampant fraud in Government programs since that time has renewed the effort" to update the statute (*ibid.*).

titled to take discovery under the liberal provisions of the Federal Rules of Civil Procedure, but the defendant in the second case would be allowed only the more limited discovery available in criminal cases. Indeed, under the district court's theory a case might proceed to trial as a "civil" case only later to be held "criminal" (and to require more procedural safeguards) if the evidence developed at trial led the district court to question the "proportionality" of the civil penalty or if the court of appeals disagreed with the district court's conclusion that the penalty was not unduly disproportionate.

Thus, under the district court's approach, the government could be placed in the untenable position of bringing an action for civil penalties under the False Claims Act without knowing in advance whether the sanctions sought would ultimately be determined to be civil or criminal. If the government guessed wrong and decided to prosecute under Section 287 first and seek civil penalties later, it would lose the right to those penalties even though there is no inherent reason why the government should not obtain them.[17] Even if the government correctly predicted that the district court would regard the "civil penalties" as criminal sanctions, then the proper procedure would be uncertain. At best, the government might be able to obtain the full penalties that Congress intended by successfully "prosecuting" under the civil False Claims Act in the same proceeding as the Section 287 prosecution.[18] At worst, the

[17] The district court's holding does not stand for the proposition that the Constitution forbids the government to obtain a $130,000 penalty for 65 false claims of $9 each, but only for the proposition that criminal rather than civil procedures govern the government's method of doing so.

[18] Such simultaneous prosecution might be permissible under *Missouri* v. *Hunter*, 459 U.S. 359 (1983), and *Albernaz* v. *United States*, 450 U.S. 333 (1981).

government would be forced to elect between the Section 287 penalties and those provided in Section 3729, or might even be precluded altogether from seeking the Section 3729 penalties, since there is no established criminal procedure for enforcing that statute. No matter what the ultimate resolution of the issues raised by the district court's case-by-case approach, the result would be a haphazard and unpredictable departure from Congress's clear intent.

Depending as it does on the court's view of whether the sanctions prescribed by Congress are disproportionate under the circumstances of the particular case, the district court's theory, if adopted, would be unpredictable and largely standardless in its application, and therefore would seriously frustrate the government's litigative efforts under the civil False Claims Act. The disruption threatened by the district court's view of the statute is at odds with Congress's admonition that "it is important that [the False Claims Act] be an effective tool" (H.R. Rep. 99-660, *supra*, at 18), since it "is used as the primary vehicle by the Government for recouping losses suffered through fraud" (*ibid.*). And the district court's theory, if followed, would hamper the government's ongoing enforcement efforts not only under the False Claims Act, but also under other, similar statutory schemes that provide for civil penalties in addition to criminal sanctions. See, *e.g.*, *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding Civil Monetary Penalties Act, 42 U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim); *Mayers* v. *Department of Health & Human Services*, 806 F.2d 995, 999 (11th Cir. 1986) (holding same statute "civil"), cert. denied, No. 86-1887 (Oct. 5, 1987); *Scott* v. *Bowen*, 845 F.2d 856, 856 (9th Cir. 1988) (same).[19]

[19] The Civil Monetary Penalties Act, which the courts of appeals in *Scott*, *Chapman*, and *Mayers* held is civil and not criminal, provides

This Court's decisions do not support any such case-by-case analysis of whether a statute is "civil" or "criminal" in nature. To the contrary, once it is established that Congress intended to create a "civil" penalty, this Court "inquire[s] * * * whether the *statutory scheme* [i]s so punitive either in purpose or effect as to negate [Congress's] intention." *Ward*, 448 U.S. at 248-249 (emphasis added). As we have shown, the question whether this statutory scheme is so punitive as to be "criminal" was answered long ago in *Hess* and *Rex Trailer*. See *Rex Trailer*, 350 U.S. at 152 (emphasis added) (*Hess* "held that *the statute involved* was remedial and not penal"); *id.* at 152 n.4 ("*Hess*, hold[s] this provision to provide a compensatory civil remedy"). What is more, the Court's answer has been reaffirmed—emphatically—by Congress in the 1986 amendments. The district court's attempt to fashion a case-specific exception to *Hess* and *Rex Trailer* should be reversed.

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for a "civil money penalty" (42 U.S.C. 1320a-7a) of up to $2000 per claim for certain false claims submitted for reimbursement by the Department of Health and Human Services, and "generally track[s] the civil penalty provision of the False Claims Act." *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146, 149-150 (5th Cir. 1986). Another statute that would be jeopardized under the district court's approach is the new Program Fraud Civil Remedies Act of 1986, 31 U.S.C. (Supp. IV) 3801 *et seq.*, which provides for civil penalties of up to $5000.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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No. 87-1383

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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As the Court, speaking through Justice Brandeis, wrote 50 years ago, "Congress may impose both a criminal and a civil sanction in regard to the same act or omission * * *." *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938). Whenever the defendant in an ostensibly civil action seeks to set up his prior criminal prosecution as a bar to the proceeding, "[t]he question for decision is thus whether [the statute applied in the second action] imposes a criminal sanction" (*ibid.*). That question, which "is one of statutory construction" (*ibid.*), is the issue we addressed in our opening brief, just as it is the issue that the district court resolved in favor of appellee (see J.S. App. 5a ("the $130,000 penalty sought in this case amounts to a criminal penalty")).[1] Nevertheless, the amicus curiae invited by this Court to brief and

[1] Cf. Amicus Br. 14 (claiming that "[t]he ruling below was much narrower than the straw man the government attacks").

argue this case in support of the judgment below insists (Br. 7) that "[t]he government * * * asks the wrong question," and that the real question is *not* whether the statute requiring the monetary judgment sought against appellee imposes a criminal sanction. According to amicus, the Court should affirm the judgment below if it determines that the relief sought by the government under the False Claims Act in this case was "punishment," whether or not that recovery was civil in nature (*ibid.*).

Amicus's position cannot be squared with numerous decisions of this Court and should be rejected once again. Contrary to amicus's position, if the Court determines that the proceeding for civil penalties against appellee was civil rather than criminal in nature, then the Double Jeopardy Clause has no role to play in this case. And, as our opening brief demonstrated, that proceeding was indeed civil.

1. The basic principle established in *Helvering* v. *Mitchell, supra*—that only "criminal" penalties give rise to double jeopardy problems—has been reaffirmed by this Court many times. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 359-360, 365 (1984) (quoting *Helvering* v. *Mitchell, supra*); 465 U.S. at 360 (double jeopardy "inapposite" when remedy is "a civil, not a criminal, sanction"); *id.* at 362 ("Unless the forfeiture sanction was intended as punishment, *so that the proceeding is essentially criminal in character*, the Double Jeopardy Clause is not applicable.") (emphasis added); *United States* v. *Ward*, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import. * * * See, *e. g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments) * * *."); *Breed* v. *Jones*, 421 U.S. 519, 528 (1975) ("[W]e have held that the risk to which the [Double Jeopardy] Clause refers is not present in proceedings that are not 'essentially

criminal.' ") (quoting *Helvering* v. *Mitchell, supra*); *United States* v. *Wilson*, 420 U.S. 332, 344 n.13 (1975) ("On a number of occasions, the Court has observed that the Double Jeopardy Clause 'prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.' ") (quoting *Helvering* v. *Mitchell, supra*); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-236 (1972) (quoting *Helvering* v. *Mitchell, supra*); *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 150-151 (1956) (quoting *Helvering* v. *Mitchell, supra*); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549 (1943) (quoting *Helvering* v. *Mitchell, supra*).[2]

As these cases amply demonstrate, *Helvering* v. *Mitchell* cannot be distinguished, as amicus suggests (Br. 11-13), on the ground that the defendant in that case had been *acquitted* in the criminal prosecution. Indeed, prior *convictions* followed by civil actions for penalties are precisely what gave rise to the cases on which we principally relied in our opening brief.

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[2] See also 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4474, at 749 (1981) ("Problems arise only when it is asserted that a nominally civil action brought by the government involves an element of punishment that runs afoul of double jeopardy principles. Although no clear principle has emerged for distinguishing remedial from punitive actions, most decisions have permitted criminal prosecutions to be followed by civil actions for injunction, forfeiture, monetary penalties, or double damages.") (footnote omitted); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.418[2], at 564 (2d ed. 1988) ("The protection against double jeopardy is afforded only to a defendant in a criminal case."); *id.* ¶ 0.418[3], at 585-586 (discussing *Helvering* v. *Mitchell, supra*); *id.* ¶ 0.418[3], at 590-592 (discussing *One Lot Emerald Cut Stones* v. *United States, supra*); J. Sigler, *Double Jeopardy* 60 & n.93 (1969) (discussing cases supporting the criminal/civil distinction and criticizing early cases that suggest a different view).

Thus, in *Rex Trailer Co.* v. *United States, supra,* the defendant had been convicted, not acquitted, of fraud, and the issue before the Court was whether the Double Jeopardy Clause permitted the assessment of civil penalties in a later proceeding. To answer that question, the Court looked to the *Helvering* v. *Mitchell* test (350 U.S. at 150-151), not to some other test that supposedly governs when the multiple-punishment aspect of the Double Jeopardy Clause is at issue. The Court concluded its opinion by observing that "[o]n this record it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy *into a criminal penalty*" (350 U.S. at 154 (emphasis added)). If amicus's position were the law, the Court's concluding sentence would have been pointless, for only the status of the civil penalties as "punishment" vel non, not their status as "criminal" or "civil" penalties, would matter.

Likewise, in *United States ex rel. Marcus* v. *Hess, supra,* the defendant had been convicted, not acquitted, under a general statute dealing with conspiracy to defraud the government,[3] and the Double Jeopardy Clause was put at issue in precisely the same way that it is here. The Court relied on the analysis of *Helvering* v. *Mitchell,* (317 U.S. at 548), framed the issue as whether the action before it was "criminal or remedial" (*id.* at 549), and based its judgment on the proposition that the action "d[id] not lose the quality of a civil action" simply because more than actual

[3] Our opening brief was in error in stating (at 11) that the conviction was under the criminal false claims statute. However, the distinction between a prior conviction under that statute and a prior conviction under the general fraud statute played no role in the Court's analysis. There is thus no basis for amicus's remarks that our misstatement reflects "a rather significant point" (Br. 15 n.10).

damages were recovered (*id.* at 550). Most devastating to amicus's position, the Court noted that " 'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it a criminal statute" (*ibid.* (citation omitted)). Every one of those statements would have been beside the point if, as amicus contends, the distinction between "criminal" and "civil" remedies is irrelevant in a multiple-punishment case.

Indeed, amicus's proposition leads to the astounding conclusion (Br. 35) that a defendant who is convicted in a criminal case, but receives a suspended sentence or a fine smaller than his prospective civil penalties, is better off than a defendant who is acquitted of criminal charges, for the former but not the latter would be able to claim the protection of double jeopardy in a subsequent civil action for "punitive" damages. The more sensible interpretation of the Clause—and the one more consistent with this Court's cases—is that *both* a convicted and an acquitted defendant can invoke the Clause to protect against subsequent criminal punishment for the same offense, but that *neither* can complain that a subsequent proceeding for civil penalties places him in "jeopardy" in the constitutional sense.

Asserted against this overwhelming weight of authority is amicus's reading of *United States* v. *La Franca,* 282 U.S. 568 (1931). *La Franca,* however, does not and cannot stand for the broad proposition—contrary to numerous later decisions—that any "punishment," whether civil or criminal, is barred by the Double Jeopardy Clause when the defendant has already been criminally convicted for the conduct that gives rise to the second proceeding. As amicus recognizes (Br. 10-11 & n.7), the Double Jeopardy Clause was addressed in *La Franca* only to the limited ex-

tent of suggesting that it would create constitutional *doubts* if the statute at issue in that case were construed to permit the imposition of civil penalties following a criminal conviction. The case was then resolved exclusively as a matter of statutory interpretation: the Court construed the word "prosecution" in 27 U.S.C. (1926 ed.) 3 to include a civil action to recover penalties for an act declared to be a crime (282 U.S. at 574-575). *La Franca* therefore resolved no constitutional issues. Furthermore, the constitutional doubts alluded to by the Court were laid to rest just seven years later in *Helvering* v. *Mitchell*, *supra*, and have not been revived since.[6]

Amicus's attempt to resurrect the proposition that the Double Jeopardy Clause applies to civil penalties that are not in fact "criminal" is not only contrary to precedent, but is also irreconcilable with the long understanding that parallel criminal and civil actions seeking penalties raise no double jeopardy concerns. It cannot be seriously sug-

[6] Some of the statements in *La Franca*, if taken to draw distinctions of importance for purposes of the Double Jeopardy Clause, certainly do not survive this Court's more recent decisions. Compare, *e.g.*, *La Franca*, 282 U.S. at 573 ("The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."), with *One Assortment of 89 Firearms*, 465 U.S. at 364 n.6 ("Mulcahey • • • argu[es] that inclusion of the forfeiture provision in th[e] section [labeled 'Penalties'] demonstrates Congress' intention to create an additional criminal sanction. This argument is unavailing; both criminal and civil sanctions may be labeled 'penalties.' "), and *Hess*, 317 U.S. at 551. Indeed, as early as 1943, in *Hess*, 317 U.S. at 554 (concurring opinion), Justice Frankfurter observed the need to "explain[ ] away uncritical language in [three specified] earlier cases," among them *La Franca*. The other two cases that Justice Frankfurter criticized were *United States* v. *Chouteau*, 102 U.S. 603 (1881), which amicus cites (Br. 7, 11) for essentially the same proposition as *La Franca*, and *Coffey* v. *United States*, 116 U.S. 436 (1886), which this Court has since expressly overruled in *United States* v. *One Assortment of 89 Firearms*, *supra*.

gested, for example, that a treble-damages action under 15 U.S.C. 15 following a defendant's conviction for price fixing is constitutionally impermissible unless it is somehow established that the extra twofold damages do not constitute "punishment." Similarly, it cannot be maintained that, under the aegis of the Double Jeopardy Clause, a defendant successfully prosecuted for manufacturing a product that kills innocent people would thereafter escape, in a civil tort action, all punitive damages (which surely include an element of "punishment").

More fundamentally, amicus never explains why it makes sense to analyze this case under the "multiple punishment" aspect of double jeopardy rather than the "multiple prosecution" aspect. This Court's decisions establish that the double jeopardy protection against multiple punishment is essentially a protection against punishment that the legislature has not authorized. "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981); *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); *Garrett* v. *United States*, 471 U.S. 773, 793 (1985). Congress plainly authorized cumulative criminal and civil remedies under the False Claims Act.[5] Thus, the prohibition of multiple

[5] In the original False Claims Act, Congress underscored its intent to make civil and criminal remedies cumulatively available by providing that a person "who shall do or commit any of the [prohibited acts] • • • shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained • • • and every such person shall *in addition thereto*, on conviction in any court of competent jurisdiction, be punished by imprisonment • • • or by fine" (Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698 (emphasis added)). The 1986 revisions of the Act likewise expressly contemplate that a civil action

punishment would not have barred the government from seeking those remedies in a single proceeding, as amicus appears to concede (Br. 8, 23 n.16, 34). It therefore is not helpful to view the issue in this case as one of unconstitutional "multiple punishment," since appellee is not being "punished" any more than Congress authorized, whether the government achieves its remedies in one proceeding or two.

The only colorable double jeopardy claim here flows from appellee's desire to be free of a second proceeding, after his criminal conviction has become final, in which the government seeks to recover the civil aspect of the False Claims Act remedy. The Double Jeopardy Clause does protect some finality interests of criminal defendants, but the Court has made it abundantly plain that the protection is available only when the second proceeding seeks to impose "criminal" penalties. See the cases cited at 2-3, *supra*; cf. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1026-1033 (1980) (distinguishing the purposes of the double jeopardy protections against multiple punishment and multiple proceedings). While it is plausible to ask whether the Double Jeopardy Clause has a role to play in the division of the False Claims Act remedies into separate criminal and civil proceedings (and to answer that it does not), amicus offers no explanation as to why the policies underlying that Clause require that this case be resolved under a doctrine

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may follow a criminal conviction by providing (31 U.S.C. (Supp. IV) 3731(d)) that a "final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements • • • shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730" of Title 31.

that asks only whether the two proceedings both involve "punishment." [6]

Amicus is therefore wrong to suggest that the dispositive question in this case is whether the civil penalties the government seeks against appellee are in some sense "punishment." Rather, amicus must shoulder the much heavier burden of showing by "the clearest proof" (*Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)) that "the statutory scheme [is] so punitive either in purpose or effect as to negate [Congress's] intention" to establish a civil penalty.

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[6] This Court has consistently expressed the values underpinning the Double Jeopardy Clause in terms that reflect the specific risks of criminal proceedings. "The underlying idea," the Court has stated, "is that [the government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188 (1957).

> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens – psychological, physical, and financial – on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to that experience only once "for the same offence."

Breed v. *Jones*, 421 U.S. 519, 529-530 (1975) (citations omitted). The Court has not suggested that civil actions pose comparable risks.

United States v. *Ward*, 448 U.S. 242, 248-249 (1980); *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 362-363 (same).[7]

2. Amicus, who denies (Br. 14) that he even must undertake the effort prescribed by *Ward*, certainly has not succeeded in that effort. In fact, to the extent that he acknowledges the need to show that the statute in this case imposes a "criminal" penalty, amicus nevertheless proposes once again a test that differs considerably from the one mandated by this Court's decisions: amicus focuses solely on whether the penalty is in some sense proportional to the government's loss *in this particular case* rather than on whether the penalty is proportional to the harms that statute was designed to remedy as a general matter. As we showed in our opening brief (at 14-21, 30), it is the latter inquiry that this Court has mandated.

This Court's majority opinions in *Hess* and *Rex Trailer* make clear that a case-by-case assessment of proportionality is inappropriate. Quite the contrary, the *Hess* majority stated that "the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole," and stressed that "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Con-

[7] That inquiry, and not an artificial "effort to find the one, true purpose behind the sanctions" (Amicus Br. 24), is what controls this case. One of the legitimate civil purposes of penalties under the civil False Claims Act is to deter fraud, just as other civil remedies such as punitive damages and treble damages serve a similar deterrent effect (see U.S. Br. 19-20). This Court, however, could not possibly have spoken more plainly in declaring that such a purpose, by itself, does not convert a civil remedy into a criminal one (see *Hess*, 317 U.S. at 550-551). See also *Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987), slip op. 9-10 (discussing common law history of actions for civil penalties).

gress" (317 U.S. at 551-552). Amicus's suggestion that the courts may impose a ceiling on civil remedies in any particular case equal to what in the court's view would constitute full restitution is thus simply contrary to *Hess*, both with respect to which branch of government should make the decision concerning the appropriate remedy, and with respect to the level of generality at which that decision can permissibly be made.

Unable to find anything in the majority opinion in *Hess* that compels a case-by-case proportionality inquiry in order to determine whether a statute is "civil" or "criminal," amicus relies instead (Br. 17-18) on Justice Frankfurter's concurring opinion in *Hess*. Justice Frankfurter suggested that under the majority's approach the defendants in any given case *should* be "allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss" (317 U.S. at 554). But the majority plainly intended no such thing. Justice Frankfurter's apparent purpose in this portion of his opinion was to take the majority to task for *not* allowing such a factual inquiry, even though Justice Frankfurter regarded such an inquiry as a logical consequence of the majority's approach.[8]

Rex Trailer, decided 13 years after *Hess*, even more clearly refutes the use of a simple proportionality inquiry in determining whether civil sanctions can follow a convic-

[8] Justice Frankfurter would have held (317 U.S. at 555) instead that "where two [separate] proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense" – an approach that would readily require reversal in this case.

tion, and, concomitantly, is even less susceptible than *Hess* to the reading that amicus would give it (Amicus Br. 19-21). The government alleged and proved *no* specific damages in *Rex Trailer* (see 350 U.S. at 152-153), and there is thus no reason to believe that the penalty imposed in *Rex Trailer* was any less than 220 times the government's direct loss from the defendant's fraud (cf. Amicus Br. 17 n.11), or eight times the government's total cost of investigation and prosecution (cf. *id.* at 6).[9] Thus, when

[9] The figures we use in text are those that amicus uses to describe the result here, but we note that amicus takes considerable liberties in repeatedly characterizing as a factual finding (Amicus Br. 4, 6, 18, 21, 29) the district court's estimate (J.S. App. 10a) of $16,000 as the amount necessary to compensate the government for its costs of investigation and prosecution. The district court resolved this case on summary judgment (see *id.* at 1a, 6a) and thus was in no position to make factual findings. The district court's $16,000 figure is more accurately characterized as a "guesstimate" than as a factual finding; indeed, the court itself acknowledged that its figure "is at best an approximation of the amount required to make the Government whole, [since] the Government, in keeping with the relief it seeks, has submitted no evidence of its expenses in this action" (*id.* at 11a). Though amicus believes (Br. 29) that the government could easily "adduce evidence" of its expenses in prosecuting appellee, there is no ready way for the government to account for the myriad types of costs it incurs in the investigation and prosecution of frauds, or to allocate such costs to a particular case. The rule proposed by amicus would thus thwart any real opportunity for the government to recoup the manifold costs it incurs in its effort to root out fraud. Cf. *Rex Trailer,* 350 U.S. at 153 (a lump sum functions to provide recovery when damages "may be difficult or impossible to ascertain"). In any event, amicus's desire to elevate the district court's estimate into a factual finding that the government suffered a loss of $16,000 is ultimately perplexing, for it suggests that the government's $130,000 recovery under the False Claims Act would be only "eight times any reasonable notion of its total loss" (Amicus Br. 7), not the "*220 times* actual damages" that amicus elsewhere claims (*id.* at 17 n.11 (emphasis in original)).

the *Rex Trailer* Court suggested that "liquidated damages" prescribed by statute must be "reasonable" (350 U.S. at 151) in order not to be deemed criminal in nature, it could not possibly have meant that the reasonableness inquiry must be conducted by dividing the liquidated damages by the actual loss and deciding whether that number was too large. Similarly, the paragraph in which the Court concluded that the liquidated damages were not unreasonable "[o]n this record" (*id.* at 154) contains no discussion of the *amount* of the government's injury, focusing only on the *fact* of injury (see *id.* at 153). Here, it is undeniably true that every one of appellee's 65 frauds injured the government, and *Rex Trailer* therefore cannot be distinguished from this case.

There is another reason why amicus's suggested case-by-case approach is misguided. The protection against double jeopardy becomes relevant only when the punishment facing the defendant is essentially *criminal.* That determination can sensibly be made only by looking at specific statutory remedies and procedures, and by assessing them in light of the interests Congress sought to advance. If a statute is intended to be civil and there is no showing that "the *measure of recovery* fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty" (*Rex Trailer,* 350 U.S. at 154 (emphasis added)), an action under that statute does not raise double jeopardy concerns simply because the measure of recovery is asserted to work "punishment" in one case. The line that the Constitution draws between civil and criminal proceedings, in the Double Jeopardy Clause as elsewhere, reflects an assessment of the different kinds of risks that are present in each type of proceeding (see note 6, *supra*). The imposition of criminal penalties represents the moral condemnation of the community and carries with it various collateral conse-

quences that are generally absent from civil proceedings, even when those proceedings seek to impose a deterrent remedy or "punitive" damages. Viewed on a case-by-case basis, many "civil" proceedings brought after criminal convictions, such as debarment from government contracting or the loss of a professional license, may be viewed as imposing disproportionately harsh remedies, or "punishment," compared with the actual harm inflicted by the individual. But such proceedings have never been held to raise double jeopardy problems. Despite their significance to the persons involved, those kinds of proceedings, judged in light of the statutes that authorize them, simply do not carry the kind of criminal overtones that bring the Double Jeopardy Clause into play.[10]

Likewise, the proceeding against appellee here was brought under the civil False Claims Act, which this Court has long understood to have remedial, not criminal, objectives. *United States* v. *Bornstein*, 423 U.S. 303, 314 (1976) (noting compensatory objective of the civil False Claims Act); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 233 (1968) (noting remedial nature of the civil False Claims Act); *Rainwater* v. *United States*, 356 U.S. 590,

[10] Of course, it is always open for an individual to try to show that the legislature did in fact intend to establish a criminal remedy while purporting to create only a civil one (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), but amicus has made no real effort to show that the civil False Claims Act falls into that category. Amicus notes (Br. 24-25) that the double damages and $2000 payment provisions were part of a bill designed to "punish" frauds, but the legislative history makes clear that those remedies were not regarded as criminal. Indeed, the original bill debated in the Senate was criticized precisely because it lacked provision for criminal "punish[ment] by fine and imprisonment" and was therefore insufficiently severe. Cong. Globe, 37th Cong., 3d Sess. 954-955 (1863). The bill then passed the Senate without criminal penalties (*id.* at 958), but the House added them as an additional remedy (*id.* at 1307), and the Senate concurred in the amendment without debate (*id.* at 1322-1323).

592 & n.8 (1958) (noting the creation of separate civil and criminal sanctions in the original False Claims Act); *Hess*, 317 U.S. at 551-552 (noting purpose of providing restitution in the civil False Claims Act).[11] Amicus's objection to the remedy in this case flows only from the fact that appellee defrauded the government 65 separate times and is liable for a civil penalty for each such fraud under the

[11] Amicus insists (Br. 25-26) that the designation of the remedies under 31 U.S.C. 3729 as "civil penalt[ies]" is of little significance, since that term appeared in the 1982 revisions that were not intended to make substantive changes. However, it is more sensible to read the "civil" designation as reflecting an understanding that those remedies were always civil in nature, and history buttresses that understanding. In the original version of the False Claims Act, Congress expressly provided both for double damages and a $2000 payment and, "*in addition thereto*," criminal penalties (Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698 (emphasis added)). Moreover, the remedy Congress provided is a civil money judgment enforceable just as any other civil judgment would be. The Court underscored that fact in *Hess*, stating (317 U.S. at 551), that although the word "forfeit" in the original Act might "under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment." The text of the Act was therefore "wholly consistent with a civil action for damages" (*ibid.*).

False Claims Act, not because he is being subjected to an action "intended to authorize criminal punishment to vindicate public justice" (317 U.S. at 548-549). That latter factor, however, is necessary to invoke the protections of the Double Jeopardy Clause.[12]

Amicus's position is especially odd because it posits a limitation on the power of Congress to prescribe remedies, yet that limitation comes into effect only when the proceeding in which the "excessive" remedy is sought follows an earlier, criminal proceeding.[13] Thus, although amicus

[12] In the civil False Claims Act, Congress chose a reasonable fixed sum of $2000 as a civil sanction ($5000 to $10,000 under the current version of the Act) to compensate the government for each false claim made and to deter such fraud in the first place. That measure of recovery cannot be deemed to be "unreasonable or excessive" (*Rex Trailer*, 350 U.S. at 154) in this case unless Congress must – as a matter of constitutional imperative – anticipate that there are "economies of scale" involved in investigating and recovering damages for many small frauds and must provide a measure of recovery specially devised for that situation in order to avoid having its civil statutes become criminal in a given setting. Considering the vast range of government business and the diversity of contractors that the False Claims Act covers, Congress can hardly be deemed to have inadvertently crossed the threshold from a civil to a criminal sanction by adopting a standard measure of recovery to ensure full compensation to the government and to discourage wrongdoers who might otherwise hope that their frauds are too small to justify the time and effort of a civil action.

[13] Amicus's suggestion (Br. 32) that this Court might somehow view the False Claims Act $2000-per-claim payment provision as discretionary is completely unfounded. The original language of the act provided that a person "who shall do or commit any of the [prohibited acts] * * * *shall* forfeit and pay to the United States the sum of two thousand dollars" (see note 5, *supra* (emphasis added)). That the provision is mandatory is confirmed by ample authority, cited in our opening brief (at 17 n.12). The district court was therefore correct in holding in its second opinion that it was compelled to award a separate $2000 payment for each of the false claims made by appellee.

poses hypothetical examples of extremely large penalties for extremely small losses in an effort to paint the government's position as unreasonable (Br. 27-28), amicus would have to concede that every one of the hypothetical penalties he identifies is one that Congress could impose and the Executive Branch could obtain so long as the government forbears from first bringing a criminal prosecution. Indeed, amicus's concessions appear to go further and suggest that the government can, without any double jeopardy problem, obtain in a single proceeding whatever penalties Congress intends, no matter how large (see 7-8, *supra*).[14] What is at stake between amicus's position and ours, therefore, is not the protection of defendants in civil cases from excessive penalties, but a restructuring of the way in which the government can obtain those penalties. There is no sound basis to invoke the Double Jeopardy Clause to compel such a drastic restructuring of the relationship between criminal and civil proceedings.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1988

[14] Depending on how this Court decides *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, cert. granted, No. 88-556 (Dec. 5, 1988), it is conceivable that some of amicus's hypothetical examples might raise Eighth Amendment issues, but for present purposes it suffices to note that amicus's position in *this* case would do nothing to aid defendants faced with the large penalties that amicus hypothesizes, unless they had been previously convicted.

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No. 87-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,

Appellant,

v.

IRWIN HALPER,

Appellee.

On Appeal From The United States District Court For The Southern District Of New York

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

The defendant was fined $5,000 and sentenced to two years in prison for $585 in false claims. The question is whether the imposition in a second proceeding of a $130,000 penalty for the same $585 in false claims constitutes a second punishment for the same offense in violation of the double jeopardy clause, or is rather simply compensation for the government's loss and thus a proper civil remedy.

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STATEMENT OF THE CASE

On April 26, 1985, appellee Irwin Halper was indicted in the United States District Court for the Southern District of New York for filing false Medicare claims, in violation of the False Claims Act, 18 U.S.C. § 287. J.A. 7-17. The indictment charged, and the government proved, that Halper had filed 65 false claims over a two-year period seeking reimbursement from the government of $10 or $12 per claim, when the proper amount was $3. The total amount by which Halper's claims were inflated over the two-year period was, as the District Court found, "[a]t most" $585. J.S. App. 10a. On July 9, 1985, Halper was convicted and sentenced to pay a "[t]otal fine" of $5,000 and to serve two years in prison. J.A. 19. Halper

paid his fine and duly reported to prison to serve his sentence.

Less than a year later, on April 11, 1986, the government returned to the District Court for the Southern District, with a new complaint against Halper seeking "damages and penalties" under the False Claims Act, 31 U.S.C. §§ 3729-3731. J.A. 21. This complaint was expressly based on the same 65 false claims that had been the basis of the prior indictment and conviction, *compare* J.A. 14-17 *with* J.A. 28-31, and sought double damages "in an amount to be determined at trial," J.A. 25, "plus $130,000 in forfeitures, together with interest, costs and attorneys' fees."[1] The government promptly moved for summary judgment on the basis of the preclusive effect of the prior criminal conviction, noting that "[t]he false claims that are the subject of the instant action are the same false claims for which defendant was convicted" and

[1] J.A. 26. The False Claims Act provided, at the time suit was brought, that a person violating the Act is liable "for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and the costs of the civil action." 31 U.S.C. § 3729 (1982). The government treated each false claim as a separate count, resulting in the $130,000 penalty. The Act was amended in 1986 to increase the penalty to "not less than $5,000 and not more than $10,000," plus triple damages and costs. 31 U.S.C. § 3729 (Supp. IV 1986). The government maintains that it could have prosecuted Halper under the amended Act, *see* Gov't Br. at 4 n.3, which would have yielded a penalty of from $325,000 to $650,000 for the $585 in false claims. The 1986 amendments also increased the maximum criminal fine from $10,000 to $250,000 for individuals and $500,000 for organizations. *See* 18 U.S.C. §§ 287, 3571 (Supp. IV 1986). If the false claim relates to a contract with the Department of Defense, the maximum fine is $1 million. *See* 18 U.S.C. § 287 note (Supp. IV 1986) (Increased Penalties for False Claims in Defense Procurement).

that "[d]efendant already has been convicted of * * * submitting false claims based on the same acts alleged in the Complaint."[2]

The District Court agreed, concluding that "[b]ecause Halper is collaterally estopped from denying the facts which entitle the Government to judgment in its favor, the motion for summary judgment is granted." J.S. App. 6a. The court, however, declined to award the government the $130,000 penalty it sought, on the ground that imposing such a penalty on Halper would be punishing him twice for the same offense in violation of the double jeopardy clause. The court noted that this Court had held that the False Claims Act's provision for double damages plus a $2,000 penalty was "not in itself a criminal penalty giving rise to a claim of double jeopardy," because its purpose was "to ensure that the Government is fully compensated for any damages it has incurred." J.S. App. 9a (citing *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943)). Given this rationale in *Hess*, however, the District Court concluded that "a civil penalty designed to make the Government whole cannot be entirely unrelated to actual damages suffered and expenses incurred by the Government," with due regard for "the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages." J.S. App. 10a.

The District Court noted that the government's actual damages were "[a]t most" $585, and that "[e]ven adding to that amount the Government's expense in investigating and prosecuting this action, the total amount necessary to

[2] R. 21: Plaintiff's Statement Pursuant to Local Rule 3(g), at ¶2; R. 20: Declaration in Support of Plaintiff's Motion for Summary Judgment, at ¶3.

make the Government whole bears no rational relation to the $130,000 penalty the Government seeks." J.S. App. 10a. The court then made the factual finding—never challenged by the government—that a recovery of $16,000 "will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action." J.S. App. 10a. The court acknowledged that this figure was "an approximation," but also noted that the government—which, as plaintiff, bore the burdens of production and proof—"submitted no evidence of its expenses in this action."[3]

Dissatisfied with the $16,000 penalty on top of the $5,000 fine and two years in prison for Halper's $585 in false claims, the government moved for an amendment of the judgment under Fed. R. Civ. P. 59(e). The government did not dispute the calculation of $585 in actual damages, nor did the government challenge the court's factual finding that $16,000 would compensate the government for its damages *and* "expenses incurred in investigating and prosecuting" the action. J.S. App. 10a. Nor did the government seek to adduce additional evidence of its expenses in response to the court's comment that it had failed to do so. *See* J.S. App. 11a. Instead, the government argued that the court had no discretion in assessing penalties under the False Claims Act, and—in the absence of government consent to a lesser amount—must impose the $2,000 penalty on each count, for a total penalty of $130,000.

On reconsideration, the District Court agreed that the $130,000 penalty was mandatory under the Act, but concluded—consistent with the analysis in its earlier opinion—that imposition of such a penalty in the circumstances of this case would violate the double jeopardy clause. The court noted that "[t]he protection against multiple punishments is implicated here," because Halper had already been punished as a result of the criminal prosecution for the same acts. J.S. App. 2a. The District Court stated that this Court in *Hess* had concluded that the civil penalty provisions were intended to be remedial, but the District Court also noted that "the *Hess* Court did not stop with an analysis of Congress' intent" but went on and "examined the effect of the penalty" which, in *Hess*, "was approximately equal to the actual loss sustained by the government." J.S. App. 3a-4a. Here, in contrast, the $130,000 penalty was "220 times the actual and easily measurable loss" sustained by the government, and thus "amounts to a criminal penalty for violations for which Halper has already been punished." J.S. App. 5a. The court therefore declined to impose the $130,000 penalty. Because the government had convinced it that it had no discretion to impose a lesser penalty in the absence of government consent, the court vacated the earlier judgment awarding a $16,000 penalty, and instead awarded the government double damages under the Act together with the costs of the action. J.S. App. 5a, 15a. This appeal followed.[4]

[3] J.S. App. 11a. The court also noted that it had not even taken into account "the $5,000 criminal fine already imposed on Halper for deterrence and as a penalty." J.S. App. 10a.

SUMMARY OF ARGUMENT

After his criminal conviction for filing false claims, Mr. Halper was punished with two years in prison and a

[4] The appellee, who proceeded *pro se* below, did not file a brief on the merits in opposition to the government's brief. This amicus brief is submitted in support of the judgment below at the invitation of the Court by Order of October 17, 1988.

$5,000 fine. He could not be punished a second time in a separate proceeding for that same offense, consistent with the double jeopardy clause. On this there is no dispute. Yet that is precisely what the government attempted to do below. It sought to impose upon Halper a $130,000 penalty for the same $585 in false claims that led to his prior criminal conviction and punishment. The District Court correctly concluded that such a recovery would, on the facts of this case, clearly constitute punishment, and was therefore barred by the double jeopardy clause.

Under this Court's decision in *Hess*, the government was free to bring a second, civil proceeding to recoup its losses from Halper, regardless of any prior criminal prosecution. Such a proceeding does not violate double jeopardy because it is brought not to punish Halper but to recompense the government, a permitted civil objective. But this rationale carries with it an inherent limitation: if the government seeks in the second proceeding to impose penalties in an amount beyond any reasonable compensation for its losses, the result is not permitted recompense but forbidden punishment. In *Hess*, the government's recovery was approximately equal to its actual damages. *See* 317 U.S. at 540, 545. Here, the recovery sought cannot be deemed compensatory because, as the District Court found, a "penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss." J.S. App. 5a.

Even if the government's loss is more broadly conceived as embracing the costs of investigating and prosecuting Halper's false claims, the court below found as fact—and the government never disputed—that $16,000 would reasonably compensate the government for all its losses, specifically including the costs of investigation and pros-

ecution. J.S. App. 10a. The recovery sought by the government was thus more than eight times any reasonable notion of its total loss, and cannot be viewed simply as recompense for that loss. This Court has recognized that the question in *Hess*—whether the second recovery recompenses the government for loss or punishes the defendant a second time for the same offense—depends "[o]n th[e] record" of each particular case. *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 154 (1956). On this record, it is clear that the District Court was correct in finding that the $130,000 penalty constituted punishment.

The government arrives at the wrong answer because it asks the wrong question. The government frames the issue as whether the second proceeding should be regarded as civil or criminal in nature. Such an inquiry might be pertinent if the question at issue concerned the multiple *prosecution* aspect of double jeopardy. In such a case it would be important to know whether the second proceeding was properly characterized as necessarily criminal in nature, so that it could not be brought at all after the prior criminal prosecution. That is not the issue here. The District Court did not rule that the second proceeding could not be brought at all, but rather that the recovery in that proceeding could not so far exceed the government's losses as to impose further punishment. This case implicates the multiple *punishment* aspect of double jeopardy protection. In such a case the overall nature of the second proceeding is not determinative; the question—which depends on the particular facts—is whether punishment has been imposed, regardless of "'the mode in which it is inflicted, whether by a civil action or a criminal prosecution.'" *United States* v. *La Franca*, 282 U.S. 568, 573 (1931) (quoting *United States* v. *Chouteau*, 102 U.S. 603, 611 (1880)).

The government also errs in forecasting dire consequences with respect to its efforts to stamp out false claims if the decision below is upheld. The ruling below permits the government to obtain the maximum in criminal sanctions and fines—recently raised to $250,000 on each count for individuals—and then bring a second action, in which the defendant is collaterally estopped, to recoup *all* of its losses, including expenses of investigation and prosecution. There is nothing extraordinary in the government accepting less than the full statutory penalty in the second proceeding, should that be necessary. Indeed, such an approach was at one time Department of Justice policy. *See United States* v. *Greenberg*, 237 F. Supp. 439, 445 (S.D.N.Y. 1965). In addition, should the government want to impose the full extent of the criminal and civil sanctions, nothing in the decision below precludes it from seeking both in a single proceeding. In such a case there would be no multiple prosecution issue, and the only multiple punishment question would be whether the penalties were within the limits set by Congress. This Court has never held, however, that multiple punishments may be imposed in separate proceedings for the same offense. That is the result the government seeks, and it should be rejected by this Court.

ARGUMENT

A. This Court's Decisions Dictate The Factual Inquiry Undertaken By The Court Below Into Whether The Penalty Recompensed The Government For Its Losses Or Punished The Defendant

More than a century ago, this Court unanimously recognized that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873). The double

jeopardy clause prohibits the imposition of a second punishment in a second proceeding for the same offense. *See id.* ("there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense"); *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) (clause protects against "being subjected to double punishments"); *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) (clause "protects against multiple punishments for the same offense"). Indeed, protection against multiple punishment for a single offense was the primary historical purpose underlying the clause.[5]

There is no dispute in this case that the government brought a second proceeding against Halper to impose the penalty of $130,000. The government suggests that it could have sought the penalty in the same proceeding as the criminal prosecution, *see* Gov't Br. at 28 & n.18, but it did not do so, and the difference between one or two proceedings is of course critical for double jeopardy pur-

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[5] The first forerunner of the clause to appear in the American Colonies was paragraph 42 of the Massachusetts "Body of Liberties," adopted by the General Court in 1641: "No man shall be twice sentenced by Civil Justice for one and the same Crime, offense, or Trespasse." American Historical Documents 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910). James Madison's first draft of what became the double jeopardy clause specified that "[n]o person shall be subject, except in cases of impeachment, to *more than one punishment* or one trial for the same offense." 1 Annals of Cong. 451-452 (1789-1791) (J. Gales ed. 1834) (emphasis supplied). The change to the more arcane language of the clause as adopted was not intended to alter Madison's meaning. *See* J. Sigler, *Double Jeopardy*, at 28-33 (1969); Note, *Twice in Jeopardy*, 75 Yale L. J. 262, 266 n.13 (1965); Thomas, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1, 3 & n.3 (1985).

poses. Nor is there any dispute that Halper was punished as a result of the first proceeding, receiving a fine of $5,000 and two years in prison. Finally, there is no dispute that the two proceedings were based on the same offense. Indeed, the government itself emphasized that the "false claims that are the subject of the instant action are the same false claims for which defendant was convicted," successfully invoking collateral estoppel in the second proceeding.[6] The issue, then, is simply whether imposing a penalty of $130,000 on Halper for $585 in false claims is punishing him for those false claims.

The proper approach to considering this question was outlined in this Court's unanimous decision in *United States* v. *La Franca*, 282 U.S. 568 (1931)—a case the government ignores. In that case, as here, the defendant was convicted and fined in a criminal prosecution, and the government thereafter brought a civil action for double taxes and penalties based on the same unlawful acts that formed the basis of the criminal conviction. *Id.* at 569-570. As the Court framed the issue:

> Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule? [*Id.* at 573.]

The Court answered no, concluding that the label affixed to the second proceeding was not controlling. To avoid the "grave constitutional question" that would arise if the defendant were punished a second time, the Court

[6] *See supra* note 2.

construed a statutory provision barring further "prosecution" of those convicted under the criminal statute as precluding the civil action. *Id.* at 572, 575. "[A]n action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." *Id.* at 575.

This conclusion did not mean, as the government assumes it must, *see* Gov't Br. at 28, that the penalties could not have been collected in a civil proceeding. It simply meant that when a defendant had already been punished in a criminal prosecution for his acts, he could not be punished again—whether in a criminal or civil proceeding—for those same acts:

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." [282 U.S. at 573 (quoting *United States* v. *Chouteau*, 102 U.S. at 611).]

It is important to recognize that *Helvering* v. *Mitchell*, 303 U.S. 391 (1938)—decided seven years after *La Franca*—considered a significantly different question. In *La Franca*, as here, the defendant had been previously convicted and punished, so the "grave constitutional question" was whether the second proceeding imposed additional punishment in violation of the double jeopardy clause.[7] In *Helvering*, the defendant had been *acquitted*

[7] 282 U.S. at 575. Indeed, the statutory provision on which the Court based its holding to avoid a constitutional ruling only applied if the defendant had been previously *convicted*. *Id.* at 571.

in the prior criminal proceeding, and thus had not been punished at all. The double jeopardy question in *Helvering* was not one of multiple punishment—there would be only one punishment—but rather whether the second proceeding was somehow inherently criminal so that the defendant could not be made to stand trial twice for the same crime.

As Justice Stewart noted for the Court in *North Carolina* v. *Pearce*, 395 U.S. at 717, the guarantee against double jeopardy consists of "three separate constitutional protections."

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. [*Id.* (footnotes omitted).]

When the first two protections are at issue, it is important to know whether the second proceeding is criminal in nature. When the third protection is at issue—as here—such a general characterization is beside the point, and the only question is whether the particular defendant, on the particular facts, is being punished a second time.

The *Helvering* Court concluded that the civil proceeding before it was "remedial in its nature," and thus not barred by the prior acquittal. 303 U.S. at 397. The Court recognized that "[w]here the *objective* of the subsequent action *** is punishment, the acquittal is a bar," but concluded that "[u]nless this sanction [a fifty percent penalty] was *intended* as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable." *Id.* at 398-399 (emphasis supplied). The focus was on the "nature" of the proceeding and the "objective" of Congress rather than the impact on the defendant,

because there was no question of multiple punishment but only of being twice in jeopardy. If the "nature" of the proceeding was not "essentially criminal" the defendant was not put twice in jeopardy, but, as *La Franca* had shown, whether the second proceeding was civil or criminal was not similarly determinative when the issue was multiple punishment.

Justice Brandeis chose his words with care in *Helvering*, and they must be read in the same manner: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." 303 U.S. at 399. The second aspect—"attempting a second time to punish *criminally*"—was at issue in *Helvering* and required analysis of the intent of Congress and the overall nature of the second proceeding. The italicized adverb is not found in Justice Brandeis' articulation of the first aspect—"punishing twice"—because, as *La Franca* demonstrated, it mattered not whether the second punishment was imposed in a civil or criminal proceeding. The question there was not whether the proceeding was intended to be civil or criminal, but simply whether the defendant was being punished a second time.

The government's analysis in this case is misdirected because it fails to grasp this critical difference between the *La Franca* fact pattern and that of *Helvering*. The government frames the issue as whether an action seeking penalties under the False Claims Act is by its nature a criminal proceeding, focusing on congressional intent and applying the analysis in cases such as *United States* v. *Ward*, 448 U.S. 242 (1980), and *Flemming* v. *Nestor*, 363 U.S. 603 (1960)—which did not involve double jeopardy at

all—and cases such as *One Lot Emerald Cut Stones & One Ring* v. *United States*, 409 U.S. 232 (1972), and *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984)—which involved prior acquittals and thus did not implicate the multiple punishment aspect of double jeopardy. In such cases the appropriate focus may well be whether Congress intended a civil or criminal sanction, *see Ward*, 448 U.S. at 248, and it may well be appropriate to insist upon "the clearest proof" before finding that what Congress intended as a civil sanction is unconstitutional because it is actually criminal. *Id.* at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. at 617).

But that is not this case. The court below did not decide that the civil False Claims Act is unconstitutional on its face because it necessarily imposes a criminal sanction. Nor did the court below rule that Halper could not be subjected to a civil proceeding under the False Claims Act because such a proceeding is "essentially criminal" and thus would subject him to double jeopardy. The ruling below was much narrower than the straw man the government attacks. The District Court held only that imposing a $130,000 penalty on Halper for $585 in false claims was punishment and, since Halper had already been punished, would violate the double jeopardy clause. The court did not hold the second proceeding invalid; indeed, the court permitted the government to recover double damages and costs in the civil proceeding. J.S. App. 5a. The court simply limited the government's recovery to avoid the clearly punitive aspect of the relief sought.[8]

[8] It is true that "the risk to which the Clause refers is not present in proceedings that are not 'essentially criminal.'" *Breed* v. *Jones*, 421 U.S. 519, 528 (1975). But this case is not about "risk"—the multiple prosecution aspect of double jeopardy—but instead about actual *results*—the multiple punishment aspect. It is not the "essential" nature of the proceeding that is at issue, but the actual effect of the sanctions in this particular case.

This Court's opinion in *Hess*, *supra*, can only be understood against this background. It addressed both the question at issue in *Helvering* and that at issue in *La Franca*, and it is important that the answers to the separate questions not be confused. *Hess* involved a *qui tam* action under the False Claims Act brought by an individual against electrical contractors who had engaged in collusive bidding on government contracts.[9] The contractors previously had pled *nolo contendere* to criminal charges under a different statute and been fined.[10] The

[9] The False Claims Act permits *qui tam* actions and, at the time *Hess* was decided, awarded the individual bringing the suit one-half of any recovery, with the other half going to the government. *See Hess*, 317 U.S. at 540.

[10] The government, in its brief, misstates the facts of *Hess* with respect to a rather significant point. The government states that the defendants in *Hess* "were convicted under the criminal false claims statute" prior to the proceeding under the civil false claims statute. Gov't Br. at 11. In fact, the criminal conviction was not under the false claims statute at all, but under a different provision, "a general statute dealing with conspiracy to defraud the government, 18 U.S.C. § 88." *Hess*, 317 U.S. at 548. At the time, the criminal false claims statute was codified at 18 U.S.C. § 80 (1940). Indeed, the District Court in *Hess* rejected the double jeopardy claim on the ground that the criminal and civil proceedings charged different offenses:

> It will be noted that this indictment made no reference to the presentation of a false claim against the Government for payment or approval, such as would be required in charging an offense under Section 5438, Revised Statutes. We cannot find that the offense charged in the indictment is the same as charged in the instant case; therefore, there is no double jeopardy here. [41 F. Supp. 197, 210 (W.D. Pa. 1941).]

In its brief before this Court in *Hess*, the government agreed with this reasoning. *See* Brief for the United States as Amicus Curiae, at 50-53. The government also noted that *Hess* was brought by a private plaintiff, so it was unclear whether the double jeopardy clause—a limitation on government action—applied at all. The government at the time did not bring successive criminal and forfeiture proceedings

amount of the false claim was $101,500, and the government's total recovery as a result of the *qui tam* action was $150,000. *See* 317 U.S. at 540, 545. The government thus received 148 percent of its actual damages in *Hess*, compared to the more than 22,000 percent figure in this case.

The contractors in *Hess* argued "that the present action should be barred," *id.* at 548—the same claim as in *Helvering*—and the Court quite naturally turned to the analysis in that case to dispose of it. As in *Helvering*, the *Hess* Court concluded that the proceeding before it was not inherently criminal but was remedial, intended not "to authorize criminal punishment to vindicate public justice" but rather to "afford the government complete indemnity for the injuries done it." 317 U.S. at 548-549. This was enough to dispose of the contention that the civil proceeding could not be brought at all.

Because the defendants in *Hess* had been previously convicted and punished, however, there was more to the case than whether it could be brought at all, and "the *Hess* Court did not stop with an analysis of Congress' intent." J.S. App. 4a. The Court went on to consider the sanction actually imposed, stating that the proceeding "does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered." 317 U.S. at 550. As noted, the government in *Hess* recovered a total of $150,000 for a $101,500 loss. The double damages provision was unobjectionable on the particular facts before the Court, "since in the nature of the *qui tam* action the government's half of the double

under the False Claims Act. *See* Brief at 46-47, 59-60. Here, in contrast, there is no dispute that the criminal and civil proceedings were both under the False Claims Act, and no dispute that both proceedings were brought by the government.

damages is the amount of the actual damages proved." *Id.* The Court also noted that private plaintiffs are often allowed to recover two, three, or four times actual damages, and "[t]he law can provide the same measure of damage for the government as it can for an individual."[11] With respect to the forfeiture provision, the Court noted that it served "to make sure that the government would be made completely whole." 317 U.S. at 551-552. Since there were 56 counts at issue in *Hess*, the total forfeiture was $112,000, "approximately equal to the actual loss sustained by the government." J.S. App. 4a.

Justice Frankfurter's separate concurrence confirmed the foregoing reading of the majority opinion. He objected to the majority's reasoning on the ground that the protections of the double jeopardy clause should not hinge on a court's determination of whether the sanctions constitute "an extra penalty, or merely an indemnity for loss suffered." 317 U.S. at 554.

> If that is the issue on which the protection against double jeopardy turns, those who invoke the Constitution *** ought to be allowed to prove that, *as a matter of fact*, the forfeiture and double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss. [*Id.* (emphasis supplied).]

[11] *Id.* at 550-551. The government's recovery in this case was not two, three, or four times actual damages, but *220 times* actual damages. Such a recovery has no recognized counterpart for private plaintiffs. *See also Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, No. 88-556 (*cert. granted* Dec. 5, 1988), in which the Court granted certiorari to consider whether a punitive damages award in a civil case of 117 times actual damages violates the Eighth Amendment.

That is, of course, precisely what happened in this case. The District Court found as a fact that the government's loss—broadly conceived—included no more than $16,000 in actual damages and "expenses incurred in investigating and prosecuting this action." J.S. App. 10a. A penalty of $130,000 "exceed[s] any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss," and therefore—under the majority's analysis—must be regarded as punitive and not remedial.

The *Hess* majority in no way disputed Justice Frankfurter's logical conclusion from its analysis. Justice Frankfurter's point did not affect the result in *Hess* because the contractors in that case could *not* show, on the facts, that the $150,000 the government received for actual damages of $101,500 exceeded all of the government's losses, including costs of investigation and prosecution.[12]

[12] The government recognizes that "the Court's analysis [in *Hess*] invoked rough notions of proportionality," but goes on to argue that the Court "did not leave open the possibility of proving disproportionality in any particular case." Gov't Br. at 14-15 n.11. As noted, the Court not only left open the possibility—as Justice Frankfurter emphasized—but also carefully considered the relationship between the government's recovery and its loss on the facts before it. *See, e.g.*, 317 U.S. at 550 (with respect to double damages, "it cannot be said that there is any recovery in excess of actual loss for the government," in light of the *qui tam* provision).

Justice Frankfurter's alternative analysis, which would avoid what he saw as the flaw in the majority's analysis of permitting a factual showing that the government's recovery exceeded a remedial amount, was based on the view that where "two * * * proceedings merely carry out the remedies which Congress has prescribed in advance fora wong, they do not twice put a man in jeopardy for the same offense." *Id.* at 555. No other member of the *Hess* Court joined this position—which would permit multiple punishments *in multiple proceedings* for the same offense—and it has never been accepted by the Court.

Thus, contrary to the government's contention, Gov't Br. at 9, the ruling below is in no way "at odds" with *Hess*, but is in fact securely grounded in the rationale of that decision. The same is true with regard to the other case on which the government principally relies, *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956). In that case the defendant purchased five surplus motor vehicles from the government, using the names of veterans entitled to priority in such purchases. The company pled *nolo* to criminal charges and paid a fine. The government then brought a civil action under a statute providing three alternative remedies: (1) $2,000 plus double damages, (2) twice the consideration agreed upon "as liquidated damages," or (3) recovery of the property and retention of the consideration "as liquidated damages." *Id.* at 149 n.1, 151. The government alleged no specific damages, but sought recovery of $2,000 for each vehicle under alternative one.

This Court upheld the recovery, construing alternative one *in pari materia* with two and three, and concluding that the recovery sought by the government "is comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Id.* at 153. As the Court reasoned, "[t]he damages resulting from this injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances." *Id.* at 153-154. The Court recognized that liquidated damages provisions, "when reasonable," were not to be regarded as penalties but as "civil in nature," and concluded on the

facts that the recovery was not "so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 151, 154.

The same analysis leads to the opposite conclusion on the facts of this case. Here the loss to the government was found by the District Court to be $585 in actual damages. J.S. App. 10a. The law is clear that "liquidated damages" of $130,000 for an actual loss of $585 are not "reasonable" but rather "so unreasonable or excessive" as to constitute "a criminal penalty." 350 U.S. at 151, 154.[13]

Nor is the analysis any different when the damages sustained by the government are more broadly conceived, to include the costs of investigation and prosecution as well as actual damages. The courts have focused on this element of loss in applying *Rex Trailer*, viewing the statutory penalty as compensation for the costs of uncovering and prosecuting false claims, even if no actual damage can be shown.[14] Here, however, the District Court found as fact that $16,000 would "reasonably compensate" the government not only for its actual damages but for "expenses

[13] *See, e.g., Lake River Corp.* v. *Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985) ("When a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, * * * and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character as a penalty is unmistakable"); *United States* v. *Commercial Constr. Corp.*, 741 F.2d 326, 328 (11th Cir. 1984) (liquidated damages clause is a penalty and not enforceable when "the liquidated amount is out of all proportion to the damages actually suffered"); *Leasing Service Corp.* v. *Justice*, 673 F.2d 70, 73 (2d Cir. 1982) (clauses "providing for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable").

[14] *See, e.g., Toepleman* v. *United States*, 263 F.2d 697, 699 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959).

incurred in investigating and prosecuting this action" as well. J.S. App. 10a. In reaching this finding, the court specifically recognized that it "must take into account the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages." J.S. App. 10a. Even with that caveat, the court concluded—and the government never disputed—that $16,000 would ensure that "the government would be made completely whole." *Hess*, 317 U.S. at 552. Given that finding, "liquidated damages" of $130,000 under the rationale of *Rex Trailer* are not recoverable for an actual loss of no more than $16,000.

The *Rex Trailer* Court expressly recognized the limited nature of its holding, concluding that *"[o]n this record* it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty." 350 U.S. at 154 (emphasis supplied). The Court itself thus recognized that the conclusion might be different when—as here—the record demonstrated that the government's recovery vastly exceeded any remedial amount. The government never disputed the District Court's factual finding that its total losses did not exceed $16,000, and never submitted any evidence of greater losses. *See* J.S. App. 11a. On this record, it cannot claim that the $130,000 penalty it seeks will serve a remedial purpose.[15]

[15] As the District Court correctly noted, "[t]he government cites no cases involving sums that even begin to approach the tremendous disparity between actual damage and the 'civil penalty' in this case." J.S. App. 4a. The government states that the courts in *United States* v. *Killough*, 848 F.2d 1523 (11th Cir. 1988), and *Scott* v. *Bowen*, 845 F.2d 856 (9th Cir. 1988) (per curiam), have concluded that the decision

B. The Approach Urged By The Government—Eschewing Any Factual Inquiry—Is Inconsistent With Double Jeopardy Protection

The government criticizes the court below for examining the particular facts before it and considering whether the $130,000 penalty for $585 in false claims would "do more than afford the government complete indemnity for the injuries done it." *Hess*, 317 U.S. at 549. According to the government, the proper approach is to look not to the particular facts but rather to the overall purpose of Congress in providing for civil sanctions. If that purpose is found to be remedial, the government argues, then any consideration of the disproportionality of the amount of the penalty to the government's loss is irrelevant.

As noted, this approach confuses the multiple prosecution aspect of double jeopardy protection with the multiple punishment aspect. Congress' overall purpose may be pertinent in deciding if the proceeding is inherently a

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below is "incorrect" and have declined to follow it. Gov't Br. at 10. The court in *Killough* did no such thing. It recognized the holding below that in this "particular case" the "disproportionate award would violate the Double Jeopardy Clause prohibition against multiple punishments * * *." 848 F.2d at 1534. The court then examined the particular facts of the case before it, and concluded that $104,000 in forfeitures and double the actual damages of $633,000—not including costs of investigation and prosecution—did not result in disproportionate recovery and would do no more than afford the government indemnity for its injuries. *Id.* The ratio of total recovery to actual damages in *Killough* was less than 2.2 to 1, compared to more than 220 to 1 in this case; the *Killough* court examined the particular facts before it (contrary to the government's position) and found no multiple punishment. It did not reject but followed the analysis below. *Scott* did not involve a double jeopardy question at all, but the quite distinct issue of whether the government was required to prove the elements of a claim under the Civil Monetary Penalties Law beyond a reasonable doubt. 845 F.2d at 856.

criminal prosecution—so that it is barred regardless of the punishment—but that *purpose* cannot affect whether the actual *result* in a given case is to recompense the government or instead impose punishment. Such an inquiry necessarily depends on the facts.

The government's approach is in essence a reincarnation of the "interest analysis" approach to double jeopardy previously rejected by this Court. Because Congress is purportedly pursuing a different interest in providing for civil false claims sanctions, the argument goes, any punishment actually inflicted is not duplicative of punishment already imposed under the criminal false claims statute. This Court has rejected such an analysis in considering dual sovereignty questions, whether urged by the defendant, *Heath* v. *Alabama*, 474 U.S. 82, 91-92 (1985), or the government, *see Abbate* v. *United States*, 359 U.S. 187, 196-197 (1959) (Brennan, J., concurring), and the analysis should gain no foothold here. When a person has been punished twice in separate proceedings for the same offense, it makes no difference whether the legislature was pursuing different interests in imposing the successive punishments. In such a case the question is not legislative intent, but rather whether the defendant has in fact been punished twice.[16]

[16] The question of multiple punishment *is* governed by legislative intent when the issue is what punishments were authorized to be imposed *in a single proceeding*. *See, e.g., Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983) ("Where * * * a legislature specifically authorizes cumulative punishment under two statutes * * * the prosecutor may seek and the trial court or jury may impose punishment under such statutes *in a single trial*") (emphasis supplied); *Ohio* v. *Johnson*, 467 U.S. 493, 500 (1984) (issue governed by legislative intent when multiple charges brought "in a single prosecution"). This Court has never permitted multiple punishment for the same offense in separate proceedings, or suggested that a legislative intent to achieve such a result would be controlling. *Contrast Hess*, 317 U.S. at 554 (Frankfurter, J., concurring) (urging such a rule).

In any event, a focus on the purpose of Congress in imposing the sanctions would be peculiarly indeterminate. As this Court recognized recently, civil penalties, like treble damages and punitive damages, are "intended to punish culpable individuals." *Tull* v. *United States*, 107 S. Ct. 1831, 1838 (1987). Sanctions of the sort at issue here are at once remedial and punitive in purpose, and any effort to find the one, true purpose behind the sanctions would be largely artificial. Just last Term, this Court emphasized that it had "eschewed" an approach that would make the distinction between criminal and civil contempt proceedings "turn simply on what their underlying purposes are perceived to be." *Hicks* v. *Feiock*, 108 S. Ct. 1423, 1431 (1988). The reason—which applies equally as well in the present context—was that "[i]n contempt cases, both civil and criminal relief have aspects that can be seen as remedial or punitive or both * * *." *Id.* The Court therefore looks not to "underlying purposes" but rather to the "character of the relief imposed," *id.* at 1429, as in this case the District Court looked to the penalty imposed to determine whether it was compensatory or punitive.

This mixture of purposes is particularly evident with respect to the statute at issue in this case. The government contends that the sanctions were intended to be remedial rather than punitive, but its brief is highly selective in its citation of the legislative history. To round out the picture, the Court should know that the double damages and forfeiture provisions were originally proposed as part of a bill "to prevent *and punish* frauds upon the Government," Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (emphasis supplied), that these provisions set forth "the mode of proceeding *to punish* persons," and that they were intended to ferret out those defrauding the government and "bring[] rogues to justice." *Id.* at 955-956 (Mr. Howard) (emphasis supplied).[17]

Perhaps recognizing that the penalty in this case cannot be sustained on the basis of any relation to a compensatory purpose, the government argues that it also serves "the additional and wholly legitimate purpose of deterring those who would submit false claims." Gov't Br. at 19. This Court, however, has unambiguously stated that "[r]etribution *and deterrence* are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.20 (1979) (emphasis supplied). *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168 (1963) ("traditional aims of punishment" are "retribution and deterrence"). In *Wolfish*, the Court noted that "[a]bsent a showing of an expressed intent to punish," the question whether a given imposition was punitive would turn on "'whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id.* at 539 (quoting *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 169). Here there is not only an expressed intent to punish, but the forfeiture of $130,000 for total losses of no more than $16,000 is clearly "excessive in relation to the alternative purpose" of compensating the government for its losses.

The government regards the "civil penalty" label as all-important, *see* Gov't Br. at 10, 21-23, but its significance diminishes when the history of the statute is examined

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[17] As one of the House sponsors of the 1986 amendments emphasized, "the dual purpose of any such law should always be to deter as well as punish fraudulent conduct." 132 Cong. Rec. H6480 (daily ed. Sept. 9, 1986) (Rep. Fish). *See also Smith* v. *Wade*, 461 U.S. 30, 85 (1983) (citing civil False Claims Act as example of a statute "subject[ing] persons to a punitive damages remedy") (Rehnquist, J., dissenting).

more carefully. The Congress that originally enacted the False Claims Act did not label the forfeiture and double damages "civil penalties," nor were they so labelled in the Revised Statutes.[18] The label appeared only in 1982, with the revision and codification of Title 31 of the United States Code. Pub. L. No. 97-258, 96 Stat. 877, 978-979. Since that codification was intended to have no substantive effect, *see* H.R. Rep. No. 651, 97th Cong., 2d Sess. 3-4 (1982), the appearance of the "civil penalty" label cannot be regarded as probative, let alone determinative of Congress' intent.[19]

This Court in *Hess* decided simply that the forfeiture and double damages provisions were not *inherently* criminal, and that they did not result in multiple punishment on the particular facts of that case.[20] In light of the mixed

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[18] *See* Act of March 2, 1863, ch. 67, 12 Stat. 696; Rev. Stat. §§ 3490, 5438, *quoted in United States* v. *Bornstein*, 423 U.S. 303, 305-306 n.1 (1976).

[19] *See also Hicks* v. *Feiock*, 108 S. Ct. at 1429 ("the labels affixed either to the proceeding or to the relief imposed * * * are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law"); *Trop* v. *Dulles*, 356 U.S. 86, 94 (1958) ("How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels posted on them!") (plurality).

[20] Even after *Hess* determined that the statute on its face was not inherently criminal, courts have noted its penal aspects. *See, e.g., United States* v. *Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971) ("The False Claims Act is quasi-penal"); *United States* v. *Schmidt*, 204 F. Supp. 540, 543 (E.D. Wis. 1962). *See also United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co.*, 131 F.2d 545, 547 (2d Cir. 1942) (False Claims Act "is not only penal, but drastically penal"). *Bausch & Lomb* was affirmed by an equally divided Court *after* the decision in *Hess*. 320 U.S. 711 (1943). The result in *Hess* has not been without its critics. *See, e.g., United States* v. *Gable*, 217 F. Supp. 82, 83 (D. Conn. 1963) (expressing view that forfeiture provisions are "penal in nature" and noting that "this Court is not so sure that the presently constituted Supreme Court would reach the same result as was reached in [*Hess*] two decades ago").

remedial and punitive purposes underlying the "civil" sanctions, it should come as no surprise that the application of those sanctions may result in punishment in particular cases.

The government's analysis is also flawed in that it recognizes no limit to the penalty Congress could impose in pursuit of a supposed remedial purpose. Although the government points to the 1986 amendments to the False Claims Act as fortifying its position, those amendments actually highlight the inherent difficulty in a theory that looks only to the purpose of Congress and eschews any inquiry into the facts of particular cases. The amendments provide for triple rather than double damages, and a $5,000 to $10,000 penalty rather than the $2,000 penalty in the old act. Here, that would mean Halper would have to pay *at least* $326,755 on his $585 in false claims, yet the government's theory would still find this disproportion wholly irrelevant to the question whether the sanction was remedial or punitive. Nor is there anything in the government's analysis that would draw a line at quadruple or ten times damages, or penalties of $100,000 or even $1 million. Indeed, as the government sees it, such increases would make a double jeopardy claim *harder* to prove, because they would show Congress' clear intent that such amounts were needed to provide an adequate weapon against fraud. *See* Gov't Br. at 25.

Under the government's approach, 200 false claims of $1 each *must* result, under the current act, in a "civil" penalty of $1 million on top of any criminal sanctions

already imposed. According to the government, *Hess* decided—once and for all, and regardless of the facts of any particular case—that such a penalty was remedial and not punitive, that since the penalty was *intended* to recompense the government for its losses, there need be no inquiry into the facts to see if it actually did so or instead served another purpose.

This is not the approach set forth in *Hess*. This Court has permitted civil sanctions after criminal punishment when those sanctions in fact are remedial and simply "make sure that the government would be made completely whole." *Hess*, 317 U.S. at 551-552. This rationale carries with it an inherent limitation on the second sanction that may be imposed. When a court *can* say that the recovery "will do more than afford the government complete indemnity for the injuries done it," *id.* at 549, the rationale no longer applies, and the penalty is a second punishment in violation of the double jeopardy clause.[21]

[21] The court applied such an analysis to the essentially identical state counterpart of the False Claims Act in *In re Garay*, 89 N.J. 104, 444 A.2d 1107 (1982). After concluding that the civil penalty provision was not criminal on its face, the court recognized that "any penalty assessed under these provisions must be tested for reasonableness as applied to the specific facts involved." *Id.* at 1112-13. The court noted that "[a]utomatic application of the maximum penalty when a person committed a large number of frauds involving small dollar amounts could be unreasonable," and concluded that on the facts before it "[t]he difference between the amount of money taken and the penalty sought [$116,000 in penalties for a $1,290.20 loss] is so great that it may far exceed the state's interest in compensation and therefore be unreasonable." *Id.* at 1113 (footnote omitted). The court ruled that the amount of the penalties was not mandatory and remanded the case so that state officials could exercise discretion in imposing a lesser amount. *Id.*

To be sure, the loss to the government must be broadly conceived, and include not only actual damages but the costs of investigating and prosecuting the action as well. The government criticizes the District Court for "dwelling on the government's 'actual damage,'" Gov't Br. at 19, but the criticism is inaccurate and unfair. The District Court specifically found as fact that $16,000 would "reasonably compensate the Government for actual damages *as well as expenses incurred in investigating and prosecuting this action.*" J.S. App. 10a (emphasis supplied). The government was free to adduce evidence of greater expenses, but, as the District Court specifically noted, it did not do so. J.S. App. 11a. Nor did the government ever challenge the trial court's factual finding, which can only be set aside if "clearly erroneous." Fed. R. Civ. P. 52(a).

In the District Court, the government recognized that "[t]he purpose of the civil penalty is to ensure that the Government will be fully compensated for any damages it has incurred."[22] On this record, the government sought to be compensated 220 times over its actual damages and more than eight times over the total of its damages and the cost of investigation and prosecution. That is not making the government whole; it is punishing Halper, who was already punished in the prior criminal proceeding.

The government also misses the point in arguing that a $2,000 penalty would be reasonable for a single $9 overcharge, and that therefore a $130,000 penalty must be reasonable for 65 $9 overcharges. Gov't Br. at 16-17. The question, under *Hess*, is the relationship between the sanction imposed and the government's loss, including

[22] R. 27: Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (Jan. 8, 1987), at 5.

costs of investigation and prosecution. The government's syllogism would only hold true if bringing the case for 65 $9 overcharges cost the government 65 times the cost of the case for one $9 overcharge. That probably is never true, and certainly was not true on the facts of this case.

The government resists a case-by-case approach, but that is the only approach that makes sense where double jeopardy is concerned. No statute violates the double jeopardy clause on its face. The question is always whether a particular person in a particular case has been subjected to "multiple punishments or repeated prosecution for the same offense." *United States* v. *Dinitz*, 424 U.S. 600, 606 (1976). Nor will such an approach be at all disruptive. If the facts establish that the recovery sought exceeds any reasonable compensation for the government's loss, the government can consent to less than the full penalty, ensuring that the government receives its full due while also ensuring that the defendant is not punished twice for the same offense.

The government has done precisely that before, apparently without concern for the dire consequences it now predicts. *See* Gov't Br. at 17 n.12. For example, in *United States* v. *Greenberg*, 237 F. Supp. 439 (S.D.N.Y. 1965), the defendant was convicted of 34 counts of violating the criminal False Claims Act, and the government thereafter brought a civil action to recover a $2,000 penalty on each of the 34 false claims. By the time of judgment, however, the government advised the court that the Department of Justice had "adopted a new policy," and that it now sought only "'as many forfeitures as the court in its discretion deems proper.'" *Id.* at 445 (quoting Government's Post Trial Memorandum of Law). Judge Feinberg imposed a $6,000 penalty rather than the $68,000 the government originally sought, in part because of "the fact

that Greenberg has already been convicted in a criminal prosecution." *Id.* [23]

In *Peterson* v. *Richardson*, 370 F. Supp. 1259 (N.D. Tex. 1973), *aff'd sub nom. Peterson* v. *Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975), the defendant was criminally prosecuted, convicted and sentenced, and the government then brought a civil action seeking a $240,000 penalty for 120 false claims totalling $16,153.44. The District Court declined to impose the $2,000 penalty on each of the 120 counts, noting that the purpose of the forfeiture was "to reasonably indemnify the government for all losses arising from the false claims" and "make sure the government would be made completely whole." 370 F. Supp. at 1267 (citing *Hess*). The court concluded that a $240,000 penalty "would be unreasonable and not remotely related to both the actual losses and inexplicable damages incurred by the government," imposing instead a $100,000 penalty. 370 F. Supp. at 1267-68. The Fifth Circuit affirmed, noting that "the Government tacitly admits that the court may exercise discretion where the imposition of forfeitures might prove excessive and out of proportion to the damages sustained by the Government."[24]

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[23] *See also United States* v. *Jacobson*, 467 F. Supp. 507, 508 (S.D.N.Y. 1979) (government "waived its right to double damages under the Act," seeking only forfeitures).

[24] 508 F.2d at 55. Other courts, while viewing themselves as constrained to impose a $2,000 penalty on each count, have expressed concern about the punitive consequences of such an approach in particular cases. *See, e.g., United States* v. *Diamond*, 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987) ("The court is troubled by the possibility that a forfeiture penalty automatically applied to each proved count of a criminal Medicare fraud indictment could work an injustice in a particular case").

A similar approach was recently endorsed by this Court in *Morris* v. *Mathews*, 475 U.S. 237 (1986). In that case the defendant was convicted of aggravated murder. After determining that this offense was barred by the double jeopardy clause, the state appellate court reduced the conviction to the non-barred offense of murder, and this Court held that such a modification was consistent with the double jeopardy clause. So too here the District Court determined that, on the facts of this particular case, a penalty of $130,000 was barred by the double jeopardy clause, and reduced the government's recovery so that it would not exceed a remedial amount.

The District Court's original decision—holding that it had discretion to limit the government's recovery under the False Claims Act—was fully in accord with this Court's frequent admonition that federal statutes are to be construed to avoid constitutional difficulties, "unless such construction is plainly contrary to the intent of Congress."[25] The government cites no legislative history indicating that the Congress that passed the False Claims Act intended to insist on a mandatory $2,000 per count forfeiture, even if such a penalty raised serious constitutional concerns.[26] If such a saving construction is not possible, the court has no choice but to deny recovery of the excessive amounts, and the government has the choice of accepting recovery of less than the full statutory penalty.

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[25] *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988). *See, e.g., United States* v. *Clark*, 445 U.S. 23, 27 (1980); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979).

[26] The government relies upon the statements of a different Congress more than a century later, Gov't Br. at 17 n.12, but recognizes that this is weak evidence of legislative intent. *See id.* at 26.

Nor is there anything about the holding below that would portend the procedural difficulties noted by the government. The government argues that it would not know in advance whether it had to prove its case beyond a reasonable doubt, or whether civil or criminal discovery rules applied. Gov't Br. at 27-28. Such concerns reflect the government's basic misconception that the issue is whether the proceeding is inherently civil or criminal. The question is rather one of multiple punishment, and the double jeopardy clause is only triggered if the government insists on recovery in a second proceeding—after punishment has already been imposed—of an amount that exceeds reasonable compensation for its losses. The proceeding can be conducted as any other civil proceeding so long as the government does not attempt to recover an excessive sum; if it intends on doing so, the procedure employed will make no difference, since multiple punishment can no more be imposed in two successive criminal proceedings than in a criminal proceeding followed by a civil proceeding resulting in punitive sanctions.[27]

Finally, the government devotes much of its brief to detailing the problem of false claims in government contracting, and stressing the need for effective tools to combat such fraud. *See* Gov't Br. at 3-4, 9, 20. The decision below will not limit the effectiveness of the criminal and civil provisions of the False Claims Act. Under the approach of the District Court, the government can pros-

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[27] The fact that the protection of the double jeopardy clause against multiple punishment is implicated does not mean that other criminal protections are as well. *See Breed* v. *Jones*, 421 U.S. at 528 n.10 ("Distinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses against public order have not similarly confined the protection of the Double Jeopardy Clause").

ecute and punish those guilty of filing false claims under the criminal provisions, obtaining on each count a sentence of up to five years in prison and a fine of up to $250,000 in the case of an individual, $500,000 in the case of an organization, and $1 million in the case of a defense contractor. *See supra* note 1. The government can then, as it did here, invoke the collateral estoppel effect of the conviction in a subsequent civil proceeding—in which the defendant has no defenses, *see* J.S. App. 9a—and automatically recover the full amount of *all* the losses it has sustained, including the costs of investigation and prosecution. All the decision below means is that the government cannot recover far beyond its damages and expenses in the second proceeding.

The government retains a broad range of other options as well. Although the Court need not pass in this case on the validity of these different scenarios, there is nothing in the rationale of the decision below that would preclude the government from seeking criminal and civil sanctions in the same proceeding, and obtaining the full range of statutorily authorized criminal and civil penalties. *See* Gov't Br. at 28 & n.18. In such a case the question of multiple punishment would be limited to ensuring that the total punishment imposed did not exceed that authorized by the legislature. Such a rule does not apply when, as here, the punishments are imposed in separate proceedings. *See supra* note 16.

Nor is there anything in the decision below that would preclude a civil action alone, with recovery of the full range of statutory penalties. We know from *Helvering* and *Hess* that such a proceeding is not inherently criminal, and even if it results in a particular case in what may be viewed as punishment, there is of course no question of *multiple* punishment—the key to the holding below.

Finally, there is nothing in the decision below that would bar a civil action after a criminal acquittal. The civil action is not inherently criminal, so the defendant is not put in jeopardy a second time, *Helvering*, *supra*, and since the defendant has not been punished, there can be no issue of multiple punishment.

In sum, nothing in the decision below interferes with the effective enforcement of both the criminal and civil provisions of the False Claims Act. The government remains free to structure its prosecutorial efforts to seek the maximum recovery authorized by Congress under both the criminal and civil false claims provisions. It need only do so in a manner consistent with the double jeopardy clause.

Even if the decision below did limit the effectiveness of the government's efforts, that is not an argument for reversal. No amount of urgency surrounding the problem of false claims and fraud in government programs could justify dispensing with the constitutional protection against the imposition of multiple punishments in separate proceedings. "[T]he fact that a given law or procedure is efficient, convenient, and useful *** will not save it if it is contrary to the Constitution." *INS* v. *Chadha*, 462 U.S. 919, 944 (1983).

* * * *

Mr. Halper was indicted, convicted, and punished for filing $585 in false claims over a two-year period. When his sentence of two years in prison and a $5,000 fine was imposed and the proceeding ended, Halper was entitled to rely upon the fact that he could not be punished again for those same false claims. He could still be made to compensate the government for its losses—and even for the costs incurred by the government in recovering its

losses—but he could not be punished again. On the undisputed facts of this case, the government sought to punish Halper a second time. A penalty of $130,000 for $585 in actual damages and no more than $16,000 in actual damages and costs of investigation and prosecution cannot be viewed as recompense. The court below correctly held that the double jeopardy clause barred the government's effort, and the judgment should be affirmed.

CONCLUSION

For the foregoing reasons, and those in the District Court's opinions, the judgment should be affirmed.

Respectfully submitted,

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